1189

Mr Justice Catron

SUPREME COURT OF THE UNITED STATES.

No. ~~195.~~ 129.

ABRAHAM LA TOURETTE AND DANIEL BUTLER, CLM'TS OF THE SCHOONER "COMMANDER-IN-CHIEF," APP'TS,

VS.

PETER R. BURTON AND WILLIAM H. LINGO, LIB'TS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

1191

SUPREME COURT OF THE UNITED STATES.

No. 195.

ABRAHAM LA TOURETTE AND DANIEL BUTLER, CLM'TS OF THE SCHOONER "COMMANDER-IN-CHIEF," APP'TS,

VS.

PETER R. BURTON AND WILLIAM H. LINGO, LIB'TS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate	1	1
Libel	2	1
Stip'n for costs	10	4
Process in rem	11	5
Stip'n for costs	13	7
Bond to marshal	14	8
Amendment to libel	18	10
Answer	19	10
Replication	20	11
Deposition of O. E. Prince	21	12
" J. Tingle	23	12
" W. N. Burton	32	16
" J. Hill	42	20
" C. Culver	50	23
" J. H. Boisseau	59	27
" J. S. Dayton	68	30
" J. S. Waglam	69	31
" J. S. Endicott	73	32
Order of reference	76	33
Notice	77	34
Deposition of D. Blizzard	78	35
" A. C. Havens	81	36
" J. S. Waglom	83	37

INDEX.

	Original.	Print.
Deposition of S. M. Brown	84	38
" W. Joline	85	38
" A. Sprague	85	39
" W. J. Brown	86	39
Exceptions to report	90	40
Report	92	41
Decree	95	43
Appeal	97	44
Bond	106	47
Petition for appeal to cir. court	108	48
Decree	112	49
Petition for appeal to Sup. Court	114	50
Bond	116	51
Citation and service	118	52

1 **United States of America,**
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this —— day of ————, in the year of our Lord one thousand eight hundred and ——, and of the independence of the said United States the eighty ——.

[L. S.]

2 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Tuesday, the 14th day of August, in the year of our Lord one thousand eight hundred and sixty—.

Present: The honorable William D. Shipman, dist. judge.

Peter R. Burton *et al.*
vs.
The Schooner Commander-in-Chief, her tackle, &c., and John Woglom, master.
} Vol. 10, page 449.

1853, March 29th.

The libellants file their libel in the words and figures following, to wit:

In admiralty. United States of America, district court of the United States for the southern district of New York.

To the honorable Samuel R. Betts, judge of the district court of the United States of America in and for the southern district of New York.

Southern District of New York, *ss:*

The libel and complaint of Peter R. Burton and William H. Lingo, who reside at Angelo, Sussex county, and State of Delaware, owners of the schooner "William Clarke," her tackle, &c., against 3 the American vessel known as and called the schooner Commander-in-Chief, of Staten island, in the State of New York, whereof one —— —— was master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein in a case civil and maritime of collision; and also against the said Captain John Woglom, master of said vessel; and thereupon the said libellants articulately propound and allege as follows:

First. That these libellants are informed and verily believe, and thereupon state, that the said vessel is now in this district, to wit, the southern district of New York, and that the collision hereinafter mentioned was upon the high seas, and within the admiralty and maritime jurisdiction of this honorable court.

Secondly. That these libellants now are, and at the several times hereinafter stated were, the true and lawful owners of the said schooner William Clarke, her tackle, &c., and that the said vessel at and before the time of the committing of the injury hereinafter stated by the said schooner Commander-in-Chief was a tight, staunch, and strong vessel, well and sufficiently manned, tackled, apparelled,
and provided with sufficient men, and otherwise provided for
4 the business and employment in which she then was. That
the said vessel at the time aforesaid was a vessel of about forty-seven tons, and manned by a proper crew for her size and employment.

Thirdly. That these libellants are informed and verily believe, and thereupon state, that the said vessel called the William Clarke, owned and manned and provided as aforesaid, on the twenty-sixth day of January last, at about ten o'clock at night, the weather being clear and moonlight, safely and securely lay at anchor to the north and east of Little Egg Harbor, and about half a mile off the Jersey beach in three and one-half fathoms of water, with a light burning and hanging in the rigging, and a man as a look-out.

Fourthly. That these libellants are informed and verily believe, and thereupon state, that whilst the said schooner William Clarke safely and securely lay as aforesaid, the said schooner Commander-in-Chief, heading south, came down under four full sails, with a free wind, and ran into and against the said schooner William Clarke,
cutting her right through abreast of the main chains.

5 Fifthly. That these libellants are informed and verily be-
lieve, and thereupon state, that from the effects thereof the said schooner William Clarke sunk within fifteen minutes after said collision, and that she, with her cargo of grain, is now a total loss.

Sixthly. That these libellants have sustained damage by the means of said collision in the following amounts: Value of vessel, two thousand five hundred dollars; value of cargo, containing about 2,087 bushels of shelled corn, one thousand five hundred dollars; value of stores and captain's clothing, forty-five dollars; making in the whole four thousand and forty-five dollars.

Seventhly. That the collision aforesaid was caused by the negligence, mismanagement, and unseamanlike conduct of the person or persons having charge of or in command at the time of the said vessel called the Commander-in-Chief, and that same was not caused by the neglect, mismanagement, or misconduct of the person or persons in charge of or in command of the said libellant's vessel, and that every effort was made that could have been made to avoid the said collision.

Eighthly. That these libellants are informed and verily be-
6 lieve, and thereupon state, that the said schooner Commander-
in-Chief had no look-out forward or in a proper place at the

time immediately preceding, or at the time of the happening of the said collision.

Ninthly. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof, if denied, these libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

Wherefore these libellants pray that process, in due form of law, according to the course and practice of courts of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel, and furniture, wheresoever the same shall be found, and that all persons having, or pretending to have, any right, title, or interest therein may be cited; and that process of arrest also issue against the said master, John Woglom, with a clause therein that, if he can not be found, that then the marshal attach the goods and chattels of the said master in this district to the amount sued for; and in case no such property can be found, that then the marshal attach the credits and effects of the said master in the hands of Abraham La-
7 tourrett and Daniel Ritter to the amount sued for; and that the said master be cited to appear and answer all and singular the matters hereinbefore set forth; and that in case the owners of said vessel and the master thereof appear, they may put in stipulations, as provided by the rules and practice of this court; and in default thereof, that the court decree against the defendants by sale of such property, credits, or effects; and that this honorable court would be pleased to pronounce for the damages aforesaid sustained by your libellants, or for such other relief in the premises as shall to law and justice appertain; and also to condemn the said vessel, her tackle, apparel, and furniture, and the parties intervening for their interest therein, and also the said John Woglom, master of said vessel, in costs.

WM. H. LINGO,
for himself & Co., owner.
WM. JAY HASKETT,
Pro. for Libellants.
W. Q. MORTON, *Advocate.*

Sworn before me this 29th March, 1853.
JOSEPH BRIDGHAM, *U. S. Com'r.*

Endorsed: 10,449. In admiralty. U. S. district court, southern district of New York. Peter R. Burton and William H. Lingo,
8 owners of the schooner "William Clarke," *vs.* The Schooner Commander-in-Chief, and also against John Woglom, master. Libel for collision.

$4,045 00

WM. JAY HASKETT,
Proctor for Libellants,
Office, 15 *Centre street, New York.*

On the within affidavits, ordered that the defendant, John Woglam, be held to bail in $4,500 00.

SAM'L R. BETTS.

March 29, 1853.

Filed March 29, 1853.

In admiralty. United States district court, southern district of New York.

Peter R. Burton and **William H. Lingo**, owners of the schooner Wm. Clark,
vs.
The Schooner Commander-in-Chief and John Woglam, master thereof.

Southern District of New York, *ss:*

9 William N. Burton, being duly sworn, deposes and says that he was master of the schooner William Clarke; that he was on board of her at the time the said sch'r Commander-in-Chief ran into her and sunk her; that he has heard read the libel in this cause; that the same is true, of his own knowledge; that after said collision this deponent went on board the said sch'r Commander-in-Chief, and the master thereof, John Woglom, admitted that he was at the wheel of the said schooner at the time she struck the sch'r Wm. Clark, and that he did not see any vessel for some minutes before the collision. And this deponent verily believes that the said collision was produced by the carelessness of the said John Woglom.

WILLIAM N. BURTON.

Sworn before me this 29th March, 1853.

JOSEPH BRIDGHAM, *U. S. Com'r.*

Endorsed: 10,449. In admiralty. U. S. district court. Peter R. Burton and Wm. H. Lingo, owners of sch'r Wm. Clark, *vs.* The Sch'r Commander-in-Chief, and John Woglom, master. Affidavit.

HASKETT, *Pro. for Libl't.*

Filed March 29, 1853.

10 District court of the United States for the southern district of New York.

Filed the —— day of ——, 185–.

Stipulation for libellant's costs entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this court on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-three, by Peter R. Burton and William H. Lingo, against the schooner Commander-in-Chief, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the said schooner, her tackle,

&c., may be condemned and sold to pay the demands of said libellants; and the said *libellant* and Ashen C. Havens, surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the *libellant*, or their surety, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars :

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator, undersigned, shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the *libellant*, above named, shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

WM. H. LINGO.
ASHEN C. HAVENS.
HENRY H. KEELER.

Taken and acknowledged this 29 day of March, 1853, before me.

J. BRIDGHAM,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ashen C. Havens and Henry H. Keeler, parties to the above stipulation, being duly sworn, doth depose and say, and each for himself saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ASHEN C. HAVENS.
HENRY H. KEELER.

Sworn to this 29 day of March, 1853, before me.

J. BRIDGHAM,
U. S. Commissioner.

Recorded the —— day of ——, 185–.

11 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York, on the 29th day of March, in the year of our Lord one thousand eight [L. S.] hundred and fifty-three, by Peter R. Burton and William H. Lingo, against the schooner Commander-in-Chief, her tackle, &c., and John Woglam, master thereof, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said schooner or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had that the said schooner or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said schooner or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the nineteenth day of April next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf: And whereas the libellant has prayed that process of arrest may issue against John Woglam, the master of said schooner:

Now, therefore, we do hereby further empower and strictly charge and command you, the said marshal, that you take and arrest the said John Woglam, if he shall be found in your district, and him safely keep, so that you have his body before the said district court, on the nineteenth day of April next, at the city hall in the city of New York, then and there to answer the said libel, and to make his allegations in that behalf; and if the said respondent cannot be found, that you attach his goods and chattels to the amount sued for; and if such property cannot be found, that you attach his credits and effects in the hands of Abraham Latourette and David Ritter, garnishees; and have you then there this writ, with your return thereon.

Witness the honorable Samuel R. Betts, judge of said court, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of our independence the seventy-seventh.

GEO. W. MORTON, *Clerk.*
W. J. HASKETT, *Proctor.*

12 $40 45.

In obedience to the within monition, I attached the schooner Commander-in-Chief, therein described, on the 29 day of March, 1853, and have given due notice to all persons claiming the same that this court will, on the 19 day of April, 1853, inst., (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

H. F. TALLMADGE,
Late U. S. Marshal.

Dated 19 April, 1853.

Cepi corpus.

H. F. TALLMADGE.
Late U. S. Marshal.

I hereby depute Peter Cook to execute the within process.
Dated 29 of March, 1853.

H. F. TALLMADGE, *U. S. Marshal.*

Vol. 10. No. 449.

Southern district of New York, United States district court.

PETER R. BURTON *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF, HER TACKLE, &c., &c., John Woglam, master.

Process in rem and personam.

Ret'ble 19 April, 1853.

W. J. HASKETT,
Proctor for Libellant.

The marshal will hold the defendant, John Woglam, to bail in the sum of four thousand five hundred dollars.

March 29, 1853.

Per CURIAM,
GEO. W. MORTON, *Clerk.*

Filed April 19, 1853.

13 *Respondent's costs.*

District court of the United States for the southern district of New York.

Filed the —— day of ——, 185–.

Stipulation entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this court on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-three, by Peter R. Burton *et al.* against the schooner Commander-in-Chief, &c., and John Woglam, master, for the reasons and causes in the said libel mentioned, and praying that said schooner, her tackle, &c., may be condemned and sold to pay the demands of the libellants and the parties thereto hereby and the parties hereto hereby consenting, that in case of default or contumacy on the part of the claimant or his surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands: And whereas, also, a claim is about to be filed in said cause by——

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators, undersigned, shall be, and are hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal by the appellate court.

ABRAHAM LATOURETTE.
JOHN T. MERSEREAU.

Taken and acknowledged this 31st day of March, 1853, before me.

JOSEPH BRIDGHAM,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John T. Mersereau, party to the above stipulation, being duly sworn, depose and say that he resides in Northfield, Staten island; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

Sworn to this 31 day of March, 1853, before me.

——— ———, *U. S. Commissioner.*

Bond to Marshal.

14 District court of the United States of America for the southern district of New York.

Filed the 31 day of March, 1853.

Know all men by these presents that we. Abraham Latourette and John T. Mersereau, are held and firmly bound unto Henry F. Tallmadge, esq., marshal of the United States for the southern district of New York, in the sum of eight thousand and ninety dollars, to be paid to the said Henry F. Tallmadge, esq., for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the thirty-first day of March, in the year of our Lord one thousand eight hundred and fifty-three.

Whereas a libel has been filed in the district court of the United States for the southern district of New York, on the 29 day of March, in the year of our Lord one thousand eight hundred and fifty-three, by Peter R. Burton and another libellant, against the schooner Commander-in-Chief, for the sum of four thousand and forty-five dollars, on which process of attachment has issued, and the said schooner is in custody of the marshal under the said attachment, and Abraham Latourette and another has applied for a discharge of said schooner from the custody of the marshal, and has filed a claim claiming the said schooner, as owner, and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said court: Now, therefore, the condition of this obligation is such, that if the above bounden Abraham Latourette and another shall abide by and perform the decree of this court, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ABRAHAM LATOURETTE. [L. S.]
JOHN T. MERSEREAU. [L. S.]

Sealed and delivered, and taken and acknowledged, this 31 day of March, 1853, before me.

GEO. W. MORTON,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John T. Mersereau, being duly sworn, doth depose and say he resides at Northfield, Staten island; that he is worth the sum of twelve thousand dollars, over and above all his just debts and liabilities.

JOHN T. MERSEREAU.

Sworn to this 31st day of March, A. D. 1853, before me.

GEO. W. MORTON,
U. S. Commissioner.

I approve of the sufficiency of the sureties to the within bond. Dated this 31st day of March, 1853.

(Signed) SAM. R. BETTS.

Recorded the —— day of ——, 185—.

15 Vol. 10, No. 449. United States district court. Peter R. Burton, &c., *vs.* The Schooner Commander-in-Chief.

COCHRANE & DONOHUE,
Proc. for Claimants.

(Bond under act of Congress of March 3, 1847.)

Filed the 31 day of March, 1853.

16 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on Tuesday, the 19 day of April, in the year of our Lord one thousand eight hundred and fifty-three—

Present: The honorable Samuel R. Betts, dis't judge.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c., John Woglam, master.

The marshal having returned the process *in rem* and *personam* issued in the above-entitled cause, "the schooner Commander-in-Chief attached, and no notice given, and that he had the body of the defendant, John Woglam, in custody"—

On motion of Mr. Donohue, it is ordered that the claimant appearance be entered, and that he have 10 days' time to file and perfect his answer.

17 Endorsed: Vol. 10, No. 449. United States district court for the southern dis't of New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, her tackle, &c.

C. DONOHUE, *Proc. for Cl'm't.*

Order for time and appearance of cl'm't.

Filed 19 day of April, 1853.

18 In admiralty. U. S. district court southern district of New York.

PETER R. BURTON and WILLIAM H. LINGO
vs.
SCH'R COMMANDER-IN-CHIEF.

The libellants move to amend the 6th article of their libel by inserting after the words "one thousand five hundred dollars," these libellants being authorized by the owners of the said corn to sue for the same in this court in the name of these libellants."

WM. JAY HASKETT,
Proc. for Lib'l'ts.

25 May, 1853.

Endorsed: 10,449. In admiralty. U. S. district court. Peter R. Burton and William H. Lingo *vs.* The Sch'r Commander-in-Chief. Amendment to libel.

WM. JAY HASKETT,
Pro. for Lib'l't.

Filed May 25, 1853.

19 *To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:*

The answer of Abraham Latourette and Daniel Butler, owners of the schooner "Commander-in-Chief," to the libel and complaint of Peter R. Burton and William H. Lingo, respectfully show:

First. The respondents admit that the schooner Commander-in-Chief was, when arrested, in this district.

Second. That as to the several matters in the second article of the libel stated these respondents are ignorant.

Third. That respondents deny the matters stated in the third article of the libel, except as hereinafter stated.

Fourth. And respondents, further answering, deny the matters stated in the fourth article and fifth article of the libel, except as hereinafter stated.

Fifth. Respondents, further answering, deny the sixth article of the libel.

Sixth. And respondents, further answering, deny the seventh article of the libel.

19½ Seventh. And respondents, further answering, deny the eighth article of the libel.

Eighth. And respondents, further answering, say they are ignorant of any collision between their vessel and the one stated in the libel, or any other vessel, except from hearsay, and as to that they cannot state, and do not know the name of the vessel with which their vessel was in collision, or whether it was at the place stated; but if it was, then the collision was the fault of the crew of the other vessel, who lay in an improper manner, in an improper place, without a light or other necessary precautions, and that the collision, so far as respondent's vessel is concerned, was unavoidable.

Wherefore respondent prays that the libel herein may be dismissed, with costs, or for such relief as may be just, &c.

ABRAHAM LATOURRETT,
By JOHN T. WOGLOM, *Agent.*

Sworn to before me this 13th day of September, 1853.

GEO. W. MORTON,
U. S. Com'r.

COCHRANE AND DONOHUE, *Proc's for Cl'm't.*
W. R. BEEBE, *Advocate.*

Endorsed: 10,449. U. S. district court. Peter R. Burton *et al.* *vs.* The Sch'r Commander-in-Chief, &c., her tackle, &c. Answer.

COCHRAN & DONOHUE, *Proctors.*

Filed Sept. 13, 1853.

20 In admiralty. United States district court, southern district of New York.

PETER R. BURTON *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF, &C., and Woglom, master.
Replication.

The replication of to the answer of to the libel of , libellants against the said schooner Commander-in-Chief, her tackle, apparel, and furniture.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer for replication, thereunto says that he will aver, maintain, and prove his libel to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said is uncertain, untrue, and insufficient to be replied unto by this repliant,
without that, that any other matter or thing whatsoever in
20½ the said answer contained material or effectual in the law to be
replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by this said libel he has already prayed.

WM. JAY HASKETT,
Pro. for Lib't.

Endorsed: 10,449. In admiralty. U. S. district court. Peter R. Burton *et al.* *vs.* The Sch'r Commander-in-Chief, and Woglom, master. Replication.

HASKETT, *Pro. for Lib'ts.*

Filed Sept. 17, 1853.

21 U. S. district court.

PETER R. BURTON *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF.
} Feb'y Term, 1858.

Mr. Haskett for libellants; Mr. Donohue, resp'd'ts.

For libellants.—John Tingle, deposition read; Wm. N. Burton, ditto, ditto; Irving Hill, ditto, ditto; Cornelius Culver, ditto, ditto; J. H. Boisseau, ditto, ditto.

For respondents.—John S. Woglom, deposition read; James S. Endicott, ditto, ditto; James S. Dayton, ditto, ditto.

For libellants.

Orrin E. Prince sworn: Captain of the George Mooney; came to anchor about sunset; cold night; light wind: moonlight forepart of evening; blowing heavy; light on my vessel; put up about dark; turned in about 9; crew came on my vessel in boats; capt. wished me to go down to the and observe the Commander-in-Chief;
saw a vessel at anchor north of us; she had a light set after
22 dark; before I turned in saw her light; went in my boat to the
Commander-in-Chief; the bearing of the vessel sunk from me about N.NE. ½ E.; the vessel that I saw before I turned in had the same bearing; no other vessel in that direction; other vessels to the south; saw the spar of the sunken vessel about ¼ of a mile off; saw no fog or other mist that night to obscure the vision.

Cross-examined.

Saw the vessel to the north of us, when she first anchored, between daylight and dark; the bow of the sunken vessel was under water; her quarter would rise out of water; when the capt. came to my vessel he came to warm himself; turned in about 9; had been on watch before that in the evening; no one left on my deck when I turned in; on deck off and on before I turned in.

Redirect.

Next morning could see her taffrail; she was lower than she was the night before; a very cold night; she was held down by the anchor.

Submitted on points.

23 In admiralty. U. S. district court, southern district of New York.

PETER R. BURTON, *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF, &c, Woglom, master, &c.
}

It is hereby agreed that the written testimony of John Tingle and William N. Burton, hereto annexed, shall be read and admitted as evidence on the trial of this cause, subject to all legal exceptions, the same as though regularly taken before a commissioner.

Dated Feb'y 16, 1854.

COCHRAN & DONOHUE, *For Cl'm'ts.*
W. JAY HASKETT.

In admiralty. U. S. district court, southern district of New York.

PETER R. BURTON, *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF, and Woglam, master.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

John Tingle, being duly sworn, deposes and says: That he is a
24 mariner, and bound to sea, so soon as the weather clears, to
Newbern, N. C. I was the mate of the sch'r William Clark, on her last voyage; we left Indian river, Delaware, bound to New York; we anchored about 2 or 3 miles to the northward of Little Egg Harbor light, about half a mile from the shore; we anchored there because it was blowing heavy; wind was too sharp to lay our course; we anchored there about six o'clock; we had six men on board, all told; after we cast anchor I cleared the ice off the deck; it was clear, moonlight shining bright.

Q. Had you a light up?

A. Yes, sir.

Q. Where was it?

A. In the main rigging. When we lay at anchor about ten o'clock, may be a little before, but not much, I saw a schooner coming right for us; she was a quarter of a mile off when I first saw her; she came steering right down on to us; I looked at her and I hallooed at her; I made some noise, and I don't know what it was; she still kept coming, and until she struck us forward of the main-chain; I run forward to get
clear of her; when I run forward a light was burning; she broke
25 our mainmast right out of her; our schooner sunk in about 15
minutes; we took our boat and went on board the schooner George Moon; the sch'r that struck us kept on for a mile or so from us; I was on deck keeping watch; in coming up the coast we saw several vessels at anchor that evening.

Q. Have you seen vessels anchor in this vicinity before?

A. Yes, sir; I have. I have been seven years on vessels, of which three have been coasting.

Q What could you have done to prevent the collision that night?

A. We could do nothing that I knew of; that night we could see a vessel with her sails up 2 or 3 miles off; a vessel without her sails, could see her about half that distance. I saw one man aft; he appeared to be at the wheel of the schooner that run into us; I did not see any other person when she struck us. When we got on the sch'r G. Moon, she hove up her anchor and came down and anchored close to the wreck of our vessel. We sailed around her before we anchored.

we could see nothing but her spars, except when the sea lifted her, then we could see her davits; we could see the spars of our
26 sunken schooner when we were coming towards her, not more
than a half mile off. We had a right smart sea on; as heavy a swell as I ever saw on that beach with the wind in that direction. The schooner that struck us came back and anchored close to us. She had her fore top-mast and jib-boom carried away. I could see plainly her condition. Our captain and two men went in a boat from the schooner G. Moon to the sch'r that struck us. We could see the sch'r that struck us with her sails up when we were coming towards her in the sch'r Geo. Moon immediately after we hove the anchor up. We were laden with corn; full cargo; yellow corn. I don't know how many tons she was; I don't how old she was; I had not known her for more than three months.

Q. What was her condition as to soundness and sea-worthiness?

A. She was a good sea-boat for the kind of her, and a good sound vessel so far as I saw of her. That was my first voyage in her.

Being cross-examined,

Says: I am a colored man, born in Delaware, some part of it; I live in Delaware now when at home; I hail from there; I have not sailed out of there since last January. I sailed out of Indian river
27 there in the William Clarke, the schooner; I don't know where
she hailed from; she got her load of grain; I did not take it in nor help to take in. I am now in the El Dorado; she hails from Philadelphia; don't know who owns her; the Capt. Espy owns a quarter; don't know who owns the balance; the capt. of the William Clark is in no vessel now; have not sailed with him since; I don't read nor write. We had capt., myself, mate, Irving Hill, Peter Burton, Cornelius Culver; that is all besides me and the capt. We had a passenger, William, I don't know his last name. I had been on board the schooner run into; I don't know how many days or how long; I was but a short time; I don't think over four, five or six days; not over that, and may be not so long; I know it was the William Clark I was aboard of, because I was told so; the capt. and a good many people told me so before I went aboard, and since she was run into; I did not put the name down anywhere; I do not know what day I shipped; I do know the month; it was January, I recollect that because I can generally recollect months; no other reason than that to recollect it; was somewhere up towards the 20th, I think. I think so because
28 I heard them say a good many times so; after we got run into
and the capt. then said it was somewheres about the 20th January; the capt. talked with me; I don't know; we have talked about it the other day; Friday or Thursday, I believe; I have only seen the capt. once before since the collision; I saw him in York last week; he carried me part of the way home from his house; and from that to last Thursday or Friday I have not seen him in New York, or any where else. I have been in the vessel I am now in going on 9 months; I shipped in June in her I think; I am sure; first part of it; about

the 9th; I don't know what day of the week we sailed from Indian river, but I think it was on Tuesday. We anchored at the breakwater, Delaware; before this night we staid there one night; that was the only time before this night; the night we got to this place to anchor was the same day we left the breakwater in the morning; I do not know as the wind changed from the time of leaving the breakwater; I steered by compass; we all steered; I could tell the points of the compass and could not read; the way is you can be shown; I can't tell who there is so many showed; the way I could steer the capt. could give me a course to steer by.

29 Q. If the capt. should give you north by E. half E., how could you tell the points?

A. You could tell by looking at it, there is no reading to it.

Q. How could you tell north by east?

A. The way was capt. came and gave the course the vessel was on and to keep it.

Q. Suppose she fell off from N. by E. to E.; how could you tell the point to bring her back to; is there any mark?

A. There is no mark on the compass. We anchored in the breakwater in the afternoon; did not look at the watch; it must have been about three o'clock; we anchored there because it looked ugly and it was getting along towards night; we anchored where we were run into, about 5 to 6 o'clock; it was not dark, it was sunset, not dark, can't tell; about six o'clock; the moon rose very early, I don't know whether before or after dark; I don't know whether it was a full moon; we lowered our sails right away after anchoring; the wind was blowing about northwest direct; we had laid our course all that day; we anchored after the George Moon and passed further up to New York, about 1 mile to 1½ or 2 miles; I could see her light bright, could see it bright. could see it bright when we anchored; a
30 good many vessels anchored about, no nearer than the George Moon; other vessels passing up and down, a great many; the light on our vessel was on the larboard side, main rigging; our vessel was heading right on the beach. I do not know which shrouds the light was hung to; it was about 12 feet above the deck. Irving Hill, our cook, put it up; he put it up as soon as we were anchored, after we got our sails down. After we had got our sails down and light up, all hands, including myself, went below until they eat supper, and then came on deck to keep watch; no one on deck besides me when I first saw the schooner. The land along there is pretty low; some few small hills. None of our people got on deck before the other vessel struck. She was not quite clear of us when the capt. got out. I did not notice her top-mast and jib-boom being gone before she got clear of us; I did not notice that before she came up and anchored; I could not see her. After she cleared us I went at getting our boat, and got into it. We saw the other schooner, as I suppose her to be, while we were going to the George Moon. She was where we first saw her, about one mile off, coming back towards our schooner;
31 there was no hail from the other vessel to us; I heard no talk after the collision. The schooner that run into us came from

the northward. There was salt-water froze on deck; no snow. When I first saw the schooner I was standing on our quarter, not doing anything; I continued to look at the schooner until I ran forward; I was on the larboard side. I kept my eyes on to her until she ran into us and until our mast came down. I do not know what hit our mast. I did not look into what injury, if any, she did to our vessel's side; she struck us kind of slanting; she did not hang at all, she kept her go. Our vessel did not go lower in the water than that you could see her davits when she lifted. She was not on the bottom. We last saw her next morning, Thursday, at after daylight, about sunrise. I don't know how many fathom of chain we had out that night. The reason she lifted as she did, and did not lift her forward part, was because I suppose she was anchored. I cleared off the ice on deck before I went below to supper.

his
JOHN + TINGLE.
mark.

Sworn before me this 15th February, 1854.

R. E. STILWELL,
U. S. Com'r.

32 In admiralty. United States district court, southern district of New York.

PETER R. BURTON *et al.*
vs.
THE SCHR. COMMANDER-IN-CHIEF,
and Woglom, master.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William N. Burton being duly sworn, deposes and says: Was master of the schr. William Clark, of Indian river. She belongs to Peter R. Burton and Wm. H. Lingo. I came out of Indian river on the 25th of January, 1853, bound to New York. I anchored under the breakwater that afternoon, lay there until the next morning, started then for New York; run to about dark and anchored off the Jersey beach about half a mile off the land, as near as I could judge. We anchored, lowered our sails, and put a light up in our rigging. The light was put up as soon as our sails were down; then shovelled the ice off our decks. Wind about N. W., blowing very fresh. We headed about N. W. It was a bright moonshiney night. We all went below and got our supper; no watch set until we got our supper and 33 warmed ourselves; then John Tingle went on deck as watch; I don't know what time he went on deck.

Q. What time do you know he went on deck?

Ans. He went on deck at 8 o'clock. The cook put the lamp in the rigging and I handed it to him; at about 10 o'clock I heard the watch call out to some one to "hard down their helm;" I started up to go on deck, and the schooner was so close into us, her jib-boom being over us, I got back into the cabin; the schooner struck us and knocked our mainmast off about 12 feet from our deck, and cut us through on

our starboard side just forward of our main rigging; that she sunk in
about 15 minutes. We left her in about 5 minutes after the blow. I
went before I left her to see the injury; she was cut right through
from one to two feet through her bends and waterways; I can't say
how far the cut went below. I put my hand there and the water had
nothing to do but to flow in. Then we lowered our boat as soon as we
could, and made for the schooner George Moon. We could see her hull
from the boat as we approached $\frac{1}{2}$ a mile. We could see her light from
our schooner. We got on board of the George Moon and passed our
trunks out of the boat on board the schooner; went in her cabin
34 and to the fire, as we were almost frozen. Capt. Prince, of the
schooner George Moon, got up and his crew and got his schooner
under way and sailed up to the vessel that struck us, and when we got
up to her we got our boat and went on board of her. She never was
so far from the George Moon that when we were approaching her but
what we could see her sails. She was anchored. I saw the captain. I
asked him first if he was the captain; he said "he was." Then I asked
him how he came to run into us; he said we had not any light up. The
vessel we went on board of was anchored about $\frac{1}{4}$ of a mile from our
wreck.

Q. How did you learn the name of the sch'r?

A. The capt. told me.

Q. Did you have a fair view of the schooner that struck you immediately after she struck you?

A. Yes; I did. I had hold of her waist when she passed us after the blow—as plain as I could see one in the night—a bright moonlight night.

Q. Was the one you boarded the one which struck you?

A. Yes, sir; I should say, as the captain said so.

Q. What did the captain say her name was?

A. The Commander-in-Chief, of Staten island.

35 Q. What did you do afterwards to ascertain her name?
(Obj.)

A. We got in the boat and went under her stern and saw her name; the name was the "Commander-in-Chief, of Staten island." There were two men in the boat besides myself; one is Capt. Moon's man and the other is a passenger, William Jones.

Q. What could you have done to save your schooner?

A. I don't see that we could do anything.

Q. Did you consider at the time about trying to save her?
(Obj.)

A. I could not see any chance to do anything with her.

Q. Did you think it over what should be done to keep her afloat?
(Obj.)

A. I run to see if there was any chance to save her when she first struck us, and I saw there was not.

Q. What was said about the brightness of the moon by the master of the schooner that struck you?
(Obj.)

A. He said he could not see a vessel far under the moon.

Q. Whom did he say was at his wheel?

A. He said he was steering himself.

Q. Did he say that he saw your sch'r?

A. He said he saw us, and hallooed to know why we had not
36 a light up. The schooner Moon anchored about 200 yards off;
the other sch'r was ¼ mile off.

Q. Could you see your spars and wreck from either of these vessels, and from which of them?

A. Could see her from the sch'r Moon; the spar remaining, and a little of her aft the starboard quarter. When the sea would lift her we could see her aft, then the sea would cover her again. We had 2,089½ bushels of yellow corn. The William Clarke was not quite six years old.

Q. What was her value?

A. I can't say exactly.

Being cross-examined.

I can read and write.

Q. What did you read on that vessel's stern? Spell it for us as you saw it.

A. "Commander-in-Chief, of Staten island."

Q. Will you swear those letters were on the stern?

A. I won't.

Q. How near this vessel you call the C. and C. did you go?

A. Her boat was lowered, swinging under her stern, and I went between her boat and stern; her boat was in the water not attached to the davits; not attached to either davits; fast with a painter to—I do not know to what.

Q. Will you swear that "Staten island" was on that vessel's stern?

A. I can't recollect.

Q. Did you make any memorandum of the name?

37 A. No, sir. Our vessel was heading on the beach before the
collision; the coast runs there N. NE. and S. SW. I have been going to sea about six years; some while winters I have not. I have been in winter before this, 3 or 4 winters ago. I have been to sea steadily for two or three years, except occasion of three weeks or a month at home. I had this vessel but one trip before this; that trip was to Philadelphia. Indian river is 10 or 12 miles below the capes. I sailed the vessel on shares. I do not know that I am related to Peter R. Burton; if any, so far off I don't know it. Peter R. Burton he resides at Angola, Sussex co., Delaware. I reside at Long Neck, Sussex co. I know that Peter R. Burton and Meares I have named are owners, because they told me they were, and they are the only ones I have heard of as owners. I anchored at the Delaware breakwater in the afternoon of what the 25 of Jan'y, 1853; don't know the hour; I can't tell; I had a watch; near three o'clock. Got under weigh next morning at sunrise. We anchored at about dark on the 26th. Before going below the ice was taken off the deck; that took, I don't know how long. I looked at my watch just as this schooner came into me, and I went down to get my things; the watch was hanging up. I will swear

38 I looked at the time; it was 10 o'clock, not more than a minute or two. The moon had fulled a day or two before. The moon rose that night about 7 o'clock. The light put up was a globe lantern; it was ten inches long; had wire round the glass. There was fluid in it burning. It was put in her larboard main rigging; I do not know to which shroud. I will swear that our man sung out to the other vessel to put his helm hard down. The light was kept when not upon the cabin. The cook had charge of the lanterns we took in the cabin. We anchored there because the wind blew hard; could hardly make our course, and it was cold. The wind had not changed any during the day. I put my hand outside of the bulwarks; I put my hand through the place in the bulwarks. I stood inside. Our vessel was loaded down to within a foot of the deck—that is, the water was that from it. I was on board of a vessel run into before; that case we were not cut down. Never was on board of a vessel cut into in that way before. Can't recollect which was done first, but think the boat was lowered by all hands before taking their things out. Four of us employed in lowering the boat; all helping to get things out and into the boat. We had 3 trunks to get out and 2 clothes bags; we got them all out and

39 into the boat. No water in the cabin while we continued aboard. We did not do anything to stop the leak; we did nothing to do anything to stop the leak. I did not think that if I had thrown a bed overboard it would have been drawn into the hole. I did not measure the break at all. The plank-shear was cut; I don't know if cut through. I don't recollect whether there was any stancheon carried away on that side. The George Moon was anchored as far off as Jersey City from New York; I can't say she was any farther. Two men rowed going aboard of her; there was six of us in all in the boat. All of our people went below in the George Moon to thaw out. The George Moon did not get under weigh before I got on deck again. I heard no hail or word from the other vessel to us at all, or anything said by them.

Q. Have you any doubt in your mind that the schooner was the Commander-in-Chief, from what you saw on her stern?

(Obj.)

A. I have no doubt but it was her. The schooner Wm. C. was smashed up from one to two feet.

Q. Did you reach your hand down to the water at the place of injury?

(Obj.)

A. Yes, sir.

40 Q. Was she injured and broken as far as you reached down?

(Obj.)

A. Yes, sir.

Q. Did she commenced to sink before you left her?

(Obj.)

A. She was sinking all the time.

Q. Had you any means on board to stop the leak?

A. We had none.

Q. Were Burton & Lingo your employers?

A. Yes, sir.

Q. Were they in possession of the sch'r as owners?
(Obj.)
A. Yes, sir.
Q. How long were you in the cabin of the George Moon?
A. I can't tell; I suppose about 15 minutes.
Q. Did you think of doing anything to save your schooner after she was sunk, and why did you not do it?
A. I did not think that we could do anything.
Q. How long were you from the time you left the schooner Wm. Clark until you came back to her wreck in the sch'r G. Moon?
A. I can't rightly tell you.
Q. How long do you think it was.
(Obj.)
A. I should judge it was an hour.
Q. Had your schooner settled any at the time you left?
A. She appeared to be a settling forward.

41 *Redirect.*

We had beds—that is, mattresses—three or four; had also blankets and quilts too; I stood down; I did not get on my knees; I stooped down and put my hand down; I put my hand out through the hole.
Q. Could you have stopped up the hole with a blanket?
A. I did not try.
Q. From the nature of the wound, could you have stopt it with a blanket?
A. I think not. I suppose the stem struck her. (Obj'n.)
WILLIAM N. BURTON.

Sworn before me this 17 day of Feb'y, 1854.
GEO. W. MORTON, *U. S. Comm'r.*

Endorsed: 10,546. In admiralty. U. S. district court. Burton *et al. vs.* Sch'r Commander-in-Chief.
Testimony of Tingle & Burton, taken 17 Feb'y, 1854.

Read in evidence and filed Feb'y 3, 1858.

42 Depositions of witnesses produced, sworn, and examined the third day of April, in the year of our Lord one thousand eight hundred and fifty-four, at Georgetown, in the county of Sussex and State of Delaware, under and by virtue of a commission issued out of the United States district court in and for the southern district of New York, in a certain cause therein depending and at issue between Peter R. Burton and William Lingo, owners of the schooner William Clark, are libellants, and the schooner Commander-in-Chief and Woglom, master of said schooner, are defendants, as follows:

Irving Hill, of Millsboro, Sussex county and State of Delaware, aged twenty-one years and upwards, being duly and publicly sworn, pursuant to the directions hereunto annexed, and examined on the part of the libellants, doth depose and say as follows:

First. To the first interrogatory he saith: That he is twenty-one years of age.

To the second interrogatory he saith: That he is a waterman, and resides at Millsboro, in the county of Sussex and State of Delaware.

43 To the third interrogatory he saith: That he was on board the schooner Wm. Clark on her last voyage.

To the fourth interrogatory he saith: That on the morning of the twenty-fifth day of Jan'y, eighteen hundred and fifty-three, on board the schooner William Clarke, we went out of Indian river; that about 3 o'clock of the same day the schooner Wm. Clark anchored at the Delaware breakwater, where she remained until about sunrise the next morning; we then got under weigh and sailed until dark, when we anchored two miles northward from Little Egg Harbor, and about 1 *mile from the beach;* that about ten o'clock on the same night, whilst we were lying at anchor, and after we had all turned in, except John Tingle, the *mate*, he was awakened by the collision of another vessel with the William Clarke. When he went on deck he found the mainmast of the William Clark broken in three pieces, by the boom of the vessel which had run into her; that the vessel was paying off and left under our stern, and went on down the beach; that they hailed the vessel several times, and hallooed to them that we were in a sinking condition and should be drowned. They
44 gave us no answer but went on. We asked them to come and
take us off, but they paid no attention to us. This we did several times. We then got in our small boat and went on board the schooner George Moon, a fishing-smack. Captain Benton then got the captain of the fishing-smack to stand back to the wreck with his vessel. When we got back we found the William Clark sunk, and the Commander-in-Chief had come back and anchored close by the wreck. Captain Burton and two men from the fishing-smack went on board the vessel, anchored near the wreck, which was said to be the Commander-in-Chief. Captain Burton and the two men came back on board the fishing-smack, which got under weigh the next morning and went to the Delaware breakwater and anchored.

To the 5th interrogatory he saith: That there was a light in our rigging.

To the 6th interrogatory he saith: That he put the light in the rigging himself.

To the 7th interrogatory he saith: That it was a globe lamp in which fluid was burned.

To the 8th interrogatory he saith: That the light was in the rigging of the schooner William Clark when he turned in about 8 o'clock
45 at night.

To the 9th interrogatory he saith: That it was a very clear, cold, and moonlight night.

To the 10th interrogatory he saith: That it was so cold as to freeze our clothes on us so soon as they became wet; that the fingers of a colored man on board our vessel were badly frozen.

To the 11th interrogatory he saith : That he did not see the place said to have been broken in the side of the vessel, but he saw that the mainmast was broken in three pieces, two of which pieces were overboard.

To the 12th interrogatory he saith : That he knows nothing except what he has stated in his answer to the eleventh interrogatory.

To the 13th interrogatory he saith : That the schooner William Clarke sunk in about three-quarters of one hour from the time she was struck and about 15 minutes after we left her.

To the 14th interrogatory he saith : That when they left the vessel she had settled, so that the water was nearly up to the cabin floor.

46 To the 15th interrogatory he saith : That he could see a vessel with her sails up on that night about three miles.

To the 16th interrogatory he saith : That he could see a vessel at anchor on that night about one mile.

To the 17th interrogatory he saith : That he could not see the hull of the schooner George Moon from their vessel, but they saw her light.

To the 18 interrogatory he saith : That they were about 1 mile from the George Moon when they could see her hull.

To the 19 interrogatory he saith : That when he returned to the William Clark he could not see her until he got nearly up to her.

To the twentieth interrogatory he saith ; That no part of the schooner William Clark could be seen when they returned to her except the foremast and one of her davits; she had sunk.

To the 21st interrogatory he saith : That they did not do anything to prevent the said schooner from sinking.

47 To the 22nd interrogatory he saith: That nothing could have been done to have prevented her from sinking.

To the 23d interrogatory he saith: That he knows no other matter or thing in relation to the said collision.

To the 24th interrogatory he saith: That he does not know the name of the vessel which run into the William Clarke, except that Captain Burton and the captain of the fishing-smack, upon their return, said it was the Commander-in-Chief.

his
IRVING × HILL.
mark.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 3d day of April, 1854, before—

EDWARD WOOTTEN,
Commissioner.

And the said Irving Hill being further examined on cross-interrogatories:

First. To the 1st cross-interrogatory he saith: That he was cook on board said schooner William Clark.

To the 2d cross-interrogatory he saith : That he was below in

48 the cabin when the collision occurred; that all the crew except the mate were below in the cabin; it was some time after supper, perhaps two hours; that they went direct from Indian river to the Delaware breakwater, and there made harbor for the night; that the on the morning of the twenty-sixth they got under weigh from breakwater for New York, and sailed until dark, when they anchored, as stated in his answer to the fourth interrogatory. We anchored on the evening of the twenty-sixth of January, about two miles to the northward of Little Egg Harbor, and one mile from the beach, as stated in his answer to the fourth interrogatory, on account of head wind; that he forms his opinion of their distance from the beach only from experience in measuring distances upon the water by the eye; that he does not know how high the hills were; that they anchored about dark; that after we anchored we cleared the ice from the deck, trimmed the lamps and put them in the rigging, eat supper, and turned in. After the collision occurred we went on deck and hailed the vessel which run into us, and asked them to take us off, and receiving no answer, we immediately took our things from the cabin, put them in the small boat, and went with them on board the
49 fishing-smack George Moon; that we did not attend to anything else than getting our things out of the vessel and saving them and our lives, and were fortunate to do that.

To the 3d cross-interrogatory he saith: That he trimmed the lamp, lighted it, and put it up himself; that it was a globe lamp, lighted with fluid, and was put up in the main rigging, about 12 ft. from the deck. It was put up about dark, immediately after we anchored, and before tea. The captain was on deck, and handed me the lamp. The rest of the crew were on deck when the lamp was put up.

To the 6th cross-interrogatory he saith: That he did not see the size of the hole made in the vessel.

To the 7th cross-interrogatory he saith: That he did not measure whether the vessel had settled, but we took up the run-board on the cabin floor, and saw the water nearly up to the floor.

To the 8th cross-interrogatory he saith: That he did not and could not do anything to prevent said schooner from sinking.

50 To the 9th cross-interrogatory he saith: That he knows no other matter or thing material or necessary for the respondents.

his
IRVING × HILL.
mark.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 3d day of April, 1854, before me.

EDWARD WOOTTEN,
Commissioner.

Deposition of Cornelius Culver, of Millsboro', Sussex county, and State of Delaware, shoemaker, aged twenty-four years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellants, doth depose and say, as follows: First—

To the first interrogatory he saith: That he is twenty-four years old last May.

To the 2nd interrogatory he saith: That he is a cordwainer, and resides at Millsboro', in the county of Sussex, and State of Delaware.

To the 3d interrogatory he saith: That he was on board the William Clark on her last voyage.

To the 4th interrogatory he saith: That he knows something
about the collision of the William Clark; that the schooner
51 William Clarke left Indian river on the twenty-fifth of January,
eighteen hundred and fifty-three, in the morning. We went
from there to the Delaware breakwater, and anchored about three o'clock in the afternoon, and remained there all night. We got under weigh and left the breakwater on the morning of the twenty-sixth of January about sunrise, and steered for New York. About dark of the same evening we anchored about two or three miles northward of Little Egg Harbor light, and he should think about 1 mile from the beach. Soon after we anchored a light was put up in the main rigging of the William Clark, from twelve to fourteen feet from the deck; that we then furled the sails, when he went down to get supper for the cook. After supper, and about 9 o'clock, the crew all turned in except the watch, John Tingle, negro, and himself, and that he turned in about quarter-past nine, leaving the watch on deck. About 10 o'clock on the same night the William Clark was run into by another vessel; that the jar threw him out of his berth on to the cabin floor; that he put his coat and boots on and went on deck, and saw the vessel which had run into us just getting clear of us, and going a little astern of us; he found the mainmast of the William
Clark carried away, and our vessel filling and sinking. The
52 vessel which had run into us kept on her course for a mile or
two and rounded to. The capt. of the William Clark called
to them to come back, that his vessel was sinking, but they paid no attention to him, and kept on. We then lowered the boat, and went on board a fishing schooner anchored about a mile to the southward of us. The captain of the fishing schooner got under weigh, and went to the William Clark; she had sunk. Capt. Burton and William Jones then went on board the schooner that had run into us. We staid on board the fishing schooner until the next morning, when we went to the William Clark, and found the stump of the mainmast had slipped out of her. We then went to the breakwater in the fishing schooner, where we went on shore at Lewis.

To the 5th interrogatory he saith: The light was still in the rigging when he went below.

To the 6th interrogatory he saith: That he saw Irving Hill put the light in the rigging of the William Clarke.

To the 7th interrogatory he saith: That it was a fluid light from a large globe lantern.

To the 8th interrogatory he saith: That the last time he saw the
light was as he went below to turn in, about ¼-past 9 o'clock.

53 To the 9th interrogatory he saith: That it was a pretty
night, but very cold; was clear, and moon shining.

To the 10th interrogatory he saith: That it was so cold as to freeze very hard.

To the 11th interrogatory he saith: That he saw the hole that was broken in the side of the vessel, but had no time to examine it; had to think about saving himself.

To the 12th interrogatory he saith: That he knows nothing, except what he has just stated in answer to the 11th interrogatory.

To the 13th interrogatory he saith: That the schooner William Clark settled and sunk soon after she was struck.

To the 14th interrogatory he saith: That when he left her the water was nearly up to the cabin floor.

To the 15th interrogatory he saith: That on that night he could see a vessel with her sails up some three miles.

To the 16th interrogatory he saith: That on that night he
54 could see a vessel at anchor about three-quarters of a mile.

To the 17th interrogatory he saith: That we could not see the hull of the schooner George Moon from our schooner.

To the 18th interrogatory he saith: That he could see the hull of the schooner George about three-quarters of a mile.

To the 19th interrogatory he saith: That we could not see the William Clark on our return from the fishing schooner until we got near to her, no part being above water except a part of the foremast and one of the davits.

To the 20th interrogatory he saith: That no part of the William Clark was to be seen but a part of her foremast and one of her davits; she was sunk.

To the 21st interrogatory he saith: That we did nothing to prevent her from sinking.

To the 23d interrogatory he saith: That he knows no other matter or thing in relation to the said collision which will benefit the libellants.

55 To the twenty-fourth interrogatory he saith: That he only knows the name of the schooner which ran into the William Clark from hearing those who went on board of her say it was the Commander-in-Chief.

CORNELIUS CULVER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 3d day of April, 1854, before—

EDWARD WOOTTEN,
Commissioner.

And the said Cornelius Culver being further examined on cross-interrogatories. First:

To the 1st cross-interrogatory he saith: That he was on board the William Clark at the time of the collision as a hand before the mast.

To the 2nd cross-interrogatory he saith: That he was below in the cabin when the collision occurred, and so were all the crew except the watch. We had supper from one to two hours before the collision.

When we left Indian river we went to the breakwater and anchored about three o'clock the same day; about sunrise the next morning we got under weigh and sailed for New York, and about dark we anchored some two or three miles northward of Little Egg Harbor light.

56 We stopped at the breakwater because it looked squally, and at the northward of Little Egg Harbor because the wind was blowing fresh, and we thought we could not get round Barnegat; this was about 1 mile from the beach; that he had no other way of judging of the distance other than by looking from the vessel to the beach; that he did not notice to see how high the hills on the shore were; that we anchored about dark on the twenty-sixth day of January; that as soon as we anchored we put up a light; the capt. cleared the ice off the deck; furled the sails, and got our suppers, and turned in, all except the watch, who remained on deck. When the collision occurred we went on deck, lowered the boat, and went on board the fishing schooner George Moon. We got our things out of the cabin, and did not attend to anything else than making our escape with them from the sinking vessel.

To the 3d cross-interrogatory he saith: That he saw the light put up by Irving Hill; that it was a globe lanthorn, burning fluid; it was put up in the main rigging, twelve or fourteen feet above the deck; that it was put up about dark; that the capt. of the William Clark was on deck and he believes handed the light to Irving Hill;
57 the rest of the crew were about on deck; it was put up before tea.

To the 6th cross-interrogatory he saith: That he had no opportunity to examine the hole made by the collision.

To the 7th cross-interrogatory he saith: That he did not measure or take any other steps to ascertain whether the vessel had settled; it was not necessary, and we had not time to measure when we saw the water nearly up to the cabin floor.

To the 8th cross-interrogatory he saith: That we did not do anything, or try to do anything, to prevent her sinking; there was nothing we could do to prevent it.

To the 9th and last cross-interrogatory he saith: That he knows no other matter or thing material or necessary for the respondents.

CORNELIUS CULVER.
EDWARD WOOTTEN,
Commissioner.

58 STATE OF DELAWARE,
Sussex County, *ss*:

I, Isaac Giles, prothonotary of the superior court of the State of Delaware, within the county of Sussex, do hereby certify that Edward Wootten, esq., by whom the foregoing depositions were taken, is a judge of the superior court of the State of Delaware, residing in Sussex county aforesaid; and that said court is a court of record, and also the signature of said Edward Wootten is genuine.

{ Superior Court of Delaware, SEAL Sussex County. } In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Georgetown, this fourth day of April, A. D. 1854.

I' C GILES,
Pro. of the Superior Court of the State of Delaware in and for the County of Sussex.

59 Endorsed: 10,449. U. S. district court. In admiralty. Peter R. Burton *et al.*, owners of the sch'r Wm. Clarke, *vs.* The schooner Commander-in-Chief and Woglom, master of said schooner. Depositions of Irving Hill and Cornelius Culver.

Filed April 6, 1854.

WM. J. HASKETT,
Pro. for Lib'ts.

U. S. district court.

PETER S. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. H. Boisseau, being duly sworn, deposeth and saith that he is bound on a voyage to sea, and expects to sail from Southhold, Long Island, within a few days. He is a native of Southhold, L. Island.

60 On the night of January 26, 1853, witness was second hand on board of the schooner George Moon, a fishing schooner. Said schooner anchored that afternoon while the sun was about an hour high; she anchored about two miles to the northward and eastward of Little Egg Harbor light, about a mile from the shore, should judge; thinks the water was between 2, 3, and 4 fathom; the wind was about NW., blowing heavy.

Q. What was the description of the night?

A. It was a very clear night; light.

Q. Was there a moon?

A. I think the moon was about 3 hours high at 10 or ½-past 10. I don't think there was any clouds to obstruct the moon; I am not certain about it. I saw a schooner, a fore-and-aft schooner, to anchor to the northward of us, half an hour after sundown. I should judge she bore N.NE. about 2 miles from us. [A man on deck had reported a schooner as having passed us, and as having come to anchor while I was below.] When I came up on deck I saw a vessel at anchor as above mentioned.

(Answer in brackets obj. to.)

At about 8 o'clock I went up on deck a second time—the moon then about an hour high. I saw then a light in the direction in which I had seen the vessel. I should think she was very near the

61 same distance from the shore that we were; not quite so far off. I don't recollect of noticing her hull or masts at this time.

I think a vessel or schooner's hull could be seen a mile off. The wind at 10 o'clock did not blow quite so heavy as at sundown. I should think it blew a 7 or 8 knot breeze. The night was not darker than at 8 o'clock; I think it was more light at 10. We got under way from our anchorage that night between 10 and 11 o'clock. Between 10 and 11 the captain of the sch'r Wm. Clark, with 6 men, came on board of us, and requested us to get under weigh and go up to where his schooner was; that she had been run into by a schooner and sunk. I did not see the name of the Wm. Clark; I only know it to be so from what the capt. said. Before we got under way I saw a vessel to the northward of us with her sails up. I should judge she was near to where I had seen the light; in shore, if anything. I am not sure whether she was stationary or in motion. I don't recollect that I saw her hull at this time. After getting under sail we headed
62 about N.NE. We made out the hull of the vessel under canvass, I should say, when we were about a mile off. We saw one mast of the sunken vessel from $\frac{1}{8}$ to $\frac{1}{4}$ of a mile off. We saw a boat pulling from off shore where I saw the mast in to the schooner with sails up. I should think we were about $\frac{1}{4}$ of a mile from the schooner when we saw the boat. There was a ground swell where the schooner was at anchor. The swell was not high enough to obscure the hull of a vessel at anchor. There was no tide. There were some vessels at anchor to the southward of us; they had lights up; there were 6 or 8. We had a light up; it was made fast on a line from the foremast to the peak halyards. The schooner put up a light just before we got to her. I think it hung in her main rigging. The night was very cold; the water that came on deck froze very quick. We found the vessel under canvass at anchor. I don't know how long she had been at anchor. I went on board of the vessel at
63 anchor with Capt. Burton, of the William Clark, in his boat; one of his men was with us. When we got on board Capt. Burton asked for the captain of the vessel. A man standing on the quarter said that he was the captain. Capt. Burton asked for the name of the vessel. The same man replied, "the Commander-in-Chief." Capt. Burton said he had done him a good deal of damage, sunk his vessel, and run him down. The captain of the schooner asked him what he was doing laying there without a light up. Capt. Burton said he had a light up, and a man on deck. The capt. of the schooner said he had not, for he had looked under his lee 3 or 4 minutes before and had seen no lights, except the lights of the vessels that were anchored together. I don't recollect that Capt. Burton made any reply to this. Capt. B. said several times that he had had a light up. The capt. of the schooner said that they had done him some damage, and carried away his flying jib-boom. He said he would take Capt. B. and his crew to Baltimore. Staid on board about 15 minutes; stood within 10 feet of the two captains all the
64 time. The same men got into the boat and left the schooner. Bright moonlight all this time. After we got down over her side Capt. Burton said he would let the boat go down along under her stern and see what her name was. We went under her stern and read her name. I read her name "The Commander-in-Chief." My

eyes were, I presume, within two or three feet of the letters on the stern of her name. The Commander-in-Chief was light, high out of water. I noticed and saw one of the sunken schooner's davits and part of her taffrail—her starboard taffrail; sometimes the swell would raise it 3 or 4 feet out of water. She was the $\frac{1}{8}$ of a mile off when I noticed this. I saw the wreck the next morning; the heel of the mainmast was afloat and out fast to some rigging; the foremast was standing. The Commander-in-Chief got under weigh that night; she was gone in the morning. To Little Egg Harbor is about 73 miles from New York.

Being cross-examined.

I did not spell her name on the stern; I read it—"Commander-in-Chief."

65 Q. Spell it for me as it was there.

A. I did not spell any word.

Q. Give us any word.

A. I saw "Commander-in-Chief," without spelling.

Q. Give us any letter you saw on the stern.

A. I saw a "C."

Q. Can you give us any other letter except "C?"

A. I did not see any more letters; I did not spell every word seperately.

Q. Repeated.

A. I saw every letter there was there.

Q. Repeated.

A. I looked at the letters and called it "Commander-in-Chief."

Q. Repeated.

A. I do not know that I can answer any letter.

Q. Repeated.

A. No, sir; I did not read or call any other single letter.

Q. Repeated.

A. I can't swear to any other single letter, although they were all there.

Q. Repeated.

A. I can't swear to any other single letter. The place she hailed from was on the stern; no particular place, but Staten island; I can recollect both words—Staten island—were spelled out. The sch'r headed NW. at the time, a little westerly; there was a boat
66 made fast to her stern, not hanging on her stern; we went between that boat and her stern. The capt. and me read the name out loud; the Capt. Burton read it first; he reaad it first; our boat came aft on the starboard side of the schooner C.-in-C. I saw no other vessels anchored to the north of us, neither before or after the collision. The vessel with the sails up was anchored near the wreck, $\frac{1}{8}$ mile off in shore. I am sure the boat we saw went to the other schooner. I could not tell the looks of the man (capt.) we saw aboard the schooner with the sails up; he had whiskers, I think; not very tall, not very short, about 5 ft. 8 in.—about medium size. I did not see the injury that was done to the hull of the sunken vessel. I

came on deck when the boat from the sunken vessel came to us. I did not see the schooner with sails up then; it was about 10 minutes after, I saw her. There was about 15 feet of the stump to the heel of the mainmast; the mainsail was furled, and all the hooks fast to it; the main sheet held it. The proper place to put a light is the best place, no particular place to put it; the way the wind was then, the best place would be between the masts, as ours was; the jib would not be so good a place; I would not think alongside the
67 mast to be a good place; the reason I think that the best place for the light between the masts is, that as the wind was the vessel headed on shore; if the wind had been along shore, the rigging would have been better than between the masts; I do not know but it would be as good a place, but not better. If it was on one side, in the rigging, and the vessel came the other, it might get in range of the mast. The forward shroud of the mast would be a little ahead of the mast on deck, if she had 3 shrouds, and the center about even with the mast.

JONATHAN H. BOISSEAU.

Sworn to before me this 4th May, 1854.

WM. H. HARNER,
Commissioner of Deeds.

Endorsed: 10,449. In admiralty. U. S. district court. Peter R. Burton *et al. vs.* The schooner Commander-in-Chief. Testimony of Jonathan H. Boisseau, taken 3d May, 1854.

Read in evidence and filed Feb'y 3, 1858.

68 SOUTHERN DISTRICT OF NEW YORK, *ss:*

James S. Dayton :

I was on board the Com'r-in-Chief as steward. I was not on deck at the time of collision; I was 3 or 4 seconds after the collision. I was not asleep; I came right up; the night was moonlight; it was very about seeing up a piece from the water; it was kind of like a fog; you could see a light a good piece—quarter of a mile. I went in our boat to the other vessel; we found her bows some down in the water, listed over a little to port; no one on board. The side that I saw was whole enough; I did not examine the other. I examined the starboard side. She was heading in on to the beach. This was below Barnegat a piece I was on board our vessel when the other boat came. I heard what was said. I heard the man who was stated to be a passenger say there was no light up on board their vessel.

Cross-exam'd.

The conversation which I speak of was the same as that spoken of by the mate; there was no other conversation. When I heard him say that, then I went away; I did not wait to hear it finished; there was a call for me and I went away. We anchored, say ½ mile off; may be not so far. I could not see her masts when we anchored.
69 We could not see her until we got the range of the moon, and

then we could see her masts. I did not look to see whether we could see our vessel from the sunken vessel; I could see our light. I can't say whether the vessel which relieved the sch'r crew was a sloop or a schooner. We left N. York that afternoon; can't say when we passed Sandy Hook. I can't say when the moon rose; I did not notice how the moon bore that night.

his.
JA'S S. × DAYTON.
mark.

Sworn to before me this 17th February, 1857.

R. E. STILWELL,
U. S. Com'r.

U. S. district court.

THE SCHOONER COMMANDER-IN-CHIEF, &c.,
ads.
PETER R. BURTON.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John S. Woglom, of Staten island, master of the schooner Commander-in-Chief; was in her at the time of the collision. I recollect the collision. At the time of the collision I was at the wheel.
70 There was a lookout—a man whose name I have forgotten. He was one of the crew. The schooner with which the collision occurred was about 100 yds. off when I first saw her. I hove my wheel up to keep off to clear. We did not clear her. Our jibboom swept her rigging, I think. I don't think our hull struck her. I saw no marks on her hull. She did not have any light; that is, the schooner we hit. The man hallooed out for us to come back to him; we did so, and sent a boat for him. I do not know what her condition was. Our mate and three men did. The night was moonlight. I did not see her, because it was a very cold night, and there was a vapor on it. You could see a light ½ a mile, I suppose. As we passed along, the man who sung out was aft. He stood right by the cabin door. As I passed along, I could not see very plainly, as I was at the wheel.

Cross-ex.

Now master of the same schooner Com'r-in-Chief. Did not own any part of the schooner. I was sailing her on shares; victualled and manned her. There was no agreement who was to pay damages in cases of collision, as between me and the owners. The moon
71 was about 2 hours high. We were about 2 miles off shore. Wind was W. NW., 5 or 6 knot breeze. I remember the crew of the schooner coming on board with some strangers. I stopped immediately after I struck her. I have never had before nor since any collision with any vessel with the Com'r-in-Chief. The vessel to which the crew of the sch'r Wm. C. went, before they came to us, lay about ¼ of mile off, in shore from them. We got most down to

this vessel above spoken of before we got around. I cannot tell whether the sch'r Wm. Clark was sunk or not when we got back. It was when we got back that we sent the boat for their assistance. I was not in the boat and cannot say where the crew of the Wm. Clark was. I saw one of her masts after we came back. The mast was above water. I could see her hull at this time. She did not sink while we were there. I saw our boat go to the vessel; they did not bring any person back from the Wm. Clark. We did not refuse to give the name of our vessel to any person who came at that time to the vessel. We were a quarter of a mile off of her at the time we came back to her. We were busy to get our vessel around, and we
very soon lost sight of her. The sloop that relieved the sch'r's
72 crew was ½ mile off; from a quarter to a half mile off. She
came up by us and anchored. The moon bore from us from 3 to 4 points on our lee bow; at the time I was standing the course down the beach. We had four sails on her. We were going down SW. by S., with the sheets 2 points free.

Redirect.

The other vessel at anchor, not the one collided with, had a light up. I saw that light about 10 minutes before we struck the other vessel. We had to get right under the moon's rays to see the vessel we came afoul of.

JOHN S. WOGLAM.

Endorsed: 10,449, U. S. district court. Schooner Commander-in-Chief, &c., *ads.* Peter R. Burton. Depositions for cl'm't.

DAYTON & WOGLOM.
BEEBE & DONOHUE, *For Cl'm't.*

Read in evidence Feb'y 3, 1858.

73 SOUTHERN DISTRICT OF NEW YORK, *ss:*

James S. Endicott, of Atlantic co., New Jersey:

I was on the Commander-in-Chief at time of collision as mate. I was not on deck at time of the collision; I came up very soon—a minute after the collision; I jumped; heard a man halloo; came back, and then went on the windward quarter. When I got there there was a man in the vessel's boat, (I suppose what is called Wm. Clarke,) hallooing for us to come back. We got the schooner about as quick as we could and stood back; anchored ¼ to ½ mile to windward; got our boat down and went to her; found no one there, and came back. Her condition was, sunk; her bow down; her starboard quarter out. It was a moonlight night—very cold. There was a vapor on the water. Anything above the vapor you could see a good ways, but a vessel's hull you could see but a short distance; you could see a light half a mile. Her foremast (the sunk vessel) was standing. Some of the other crew came on board the Commander-in-Chief. I heard our capt. ask one of these men that came on board why he had no light up; he said he had, and a passenger said so, too. He afterwards said

to me he did not know whether the light was up or not, as he
74 had been below at the time; this was the passenger that said
so; I had the wheel afterwards that night; I saw another vessel without a light; it was difficult to clear her; I came near running into her; when I came near running into that vessel I was on the look-out forward; in standing back to the other schooner (Wm. Clark) I could not see her until we got under the line of the moon; when we went to her she was heading on to the beach; I looked at the starboard side; I did not see any injury to it; her starboard was standing; I saw nothing injured more than her mast gone.

Cross-ex.

We went a quarter of a mile before we came about. The first time I saw any of the crew of the sunken vessel was when they were coming up the sides of the Com'r-in-Chief; I supposed them to be the crew. When we came back we anchored about from a quarter to half a mile. She bore then about S.E. by E., smooth sea; saw a schooner sailing around us; judged her to be a fishing smack. The boat that came to us came from the vessel that sailed near to us,
and hove-to on our starboard quarter. She came within 20
75 or 30 yards of us. I don't think we could see her sails and
over a hundred yards. We had a light after we anchored on our starboard fore rigging. We could see the spars of the sunken vessel, when it was in the rays of the moon, from our deck. There was only one mast standing. There were five fathoms of water where we anchored.

Redirect.

I did not see any light on the sunken vessel.

JAS. S. ENDICOTT.

Sworn to this 17 day of Feb'y, 1857, before me.

R. E. STILWELL,
U. S. Commissioner.

Endorsed: U. S. district court. The Schooner Commander-in-Chief *ads.* Peter R. Burton *et al.* Deposition of James S. Endicott on the part of clm't.

BEEBE, DEAN & DONOHUE,
Pro. for Cl'm'ts.

Read in evidence Feb'y 3, 1858.

76 At a stated term of the dist. court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Tuesday, the 11th day of May, in the year of our Lord one thousand eight hundred and fifty-eight.

Present: The honorable Chas. A. Ingersoll, dist. judge.

Peter R. Burton *et al.*
vs.
The Schooner Commander-in-Chief, her tackle, &c. } 10, 449, 456.

This case having been heard on the pleadings and proofs, and submitted on points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the libellants recover in this action against the schooner Commander-in-Chief, her tackle, &c., the actual damages to vessel and cargo sustained by the collision in the pleadings mentioned and set forth, with costs to be taxed, and that the said schooner be condemned therefor.

And it is further ordered that it be referred to one of the commissioners of the court to ascertain and compute the amount of such damages, and report thereon to this court with all convenient speed.

(Sign'd) CHAS. A. INGERSOLL.

77 Endorsed: Vol. 10, 449, 456. U. S. dist. court for the south'n dist. of New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, her tackle, &c.

W. J. HASKETT, *Proc. for Lib't.*
C. DONOHUE, " " *Cl'm't.*

Int'g, decree, and order of reference.

Filed eleventh day of May, 1858.

77 District court of the United States, for the southern district of New York.

Peter R. Burton *et al.*,
vs.
The Schooner Commander-in-Chief, her tackle, &c., &c., and John Woglam, master. } Notice of reference. 10, 456.

In conformity with the order entered in the above-entitled cause, you will please to take notice that the reference ordered therein will be proceeded with before me (a commissioner duly appointed by the circuit court of the United States for the southern district of New York, under and by virtue of the acts of Congress in such case made and provided) at my office at the United States courts, at 41 Chamber st., in the city of New York, on the 20th day of May inst., at 10 o'clock in the forenoon of that day, at which time and place you are hereby notified to attend with the testimony you may have to offer in the matter referred.

Dated New York, the 19 day of May, A. D. 1859.

Yours, &c.,

GEO. W. MORTON,
United States Commissioner, duly appointed by the Circuit Court of the United States for the southern district of New York in the second circuit.

To **Beebe, Dean & Donohue.**

10, 449. In admiralty. U. S. dist. court, south'n dist. of New York. Peter R. Burton *et al. vs.* Sch'r Com'r-in-Chief. No. of reference, May 20, 1859. Due service of a copy of the within notice is admitted. May 19, '59.

78 U. S. district court.

PETER R. BURTON *et al.*
vs.
THE SCH'R COMMANDER-IN-CHIEF.
W. J. Haskett, 10.449. C. Donohue.

1859, *May* 20*th.*—The proctor for the libellant appears and produces notice of reference. The proctor for the claimant being present, the reference is proceeded with.

David Blizzard (sworn) says: Lives in Lewis, Delaware, Sussex county; seafaring man 18 y'rs; part of time out of N. Y., part of Philadelphia. I know P. R. Burton and the owner; know sch'r "Wm. Clark," owned by Burton & Lingo. I sailed sch'r 2 y'rs previous to her being lost. I think she was lost about a month after I left her. I think it was in 1853 I left her. Capt. Wm. Burton took charge of her, and on his second voyage the schooner was run down. When I sailed her I would not have taken $3,000 for her. (Objected to.) I should say she was worth $3,000. Corn was worth, at Indian river, Delaware, in the early part of Jan'y, 1853, 56 to 60 cents per bushel, by measurement; freight from Indian river to New York was worth 10 cents per bushel.

Cross-examined.

79 I am a native of the State of Delaware; Burton belongs there also. I am not a regular ship carpenter; I work about the yard, cutting, hewing, and tree nailing, &c. I never owned a vessel. I have commanded three vessels. I never bought or sold vessels for other people. The Wm. Clark was built at Camden, N. J. I was not there when she was building. I cannot recollect her tonnage now, to be positive. I think she was built in 1847. Do not know who she was built by, nor who she was built for. Her frame was of white oak, her sides and bottom were also of white oak plank, and her decks of white pine. She had a small trunk. She had a cabin with 4 berths. I do not know where the oak came from. When I was on her she had mainsail, foresail, jib, flying jib, and gaff topsail. When I first knew her, in the year 1851, she belonged to Indian river. She belonged to the same owners. When I commanded her I went wherever I could get freight. I kept her going pretty busily. I don't know what she cost originally. I had a new jib I bought from the firm of Blair & Higgins in New York. I bought a foresail from a vessel that was wrecked on her first voyage; it cost, with the alterations, $37. I bought of Plummerfelt, of Philadelphia, a gaff topsail, which, I think, cost me $8. I had two sets main 80 halyards and running rigging, amounting to about $20. That is all I had done. I have since commanded the sloop Hope, of

Lewis; she is 30 tons. Since then I commanded the sch'r Gen'l John Cropper; she is about 100 tons. I commanded her 1 year. Those are all the 3 vessels I have commanded. I have been in the corn trade. I have carried corn as freight. I never bought or sold corn—is an article of merchandise.

Redirect.

I don't know that I have ever had occasion to examine vessels in my part of the country, in regard to their value.

Q. How then do you know the value of this vessel? (Obj. to.)

A. By the rig, size, dimensions, &c.

Q. Have you seen vessels sold there? (Obj. to.)

A. Yes, sir.

Q. How do you judge of the value of this vessel?

A. By seeing others of that class sold there. When I was on board I found her sound and in good condition.

Recross.

She was ceiled; I never bored her; I have seen four streaks of her ceiling taken up and the timbers exposed; looked sound; I have seen a sch'r called the George L., owned by Mr. Wolf, sold there; I do not know her tonnage, nor how old she was; I did not examine her; she was sold some 2 or 3 years ago to a man at Snow Hill,
Maryland; another called the H. Wolf, a fore-and-aft schooner
81 of about 100 tons, belonging to Henry Wolf; she was sold 2
years; I do not know when she was built; I never examined
her; also the sch'r Anna B. Russel, she has been sold about 5 years; she was owned by a man by the name of Russell; she was 90 or 100 tons; do not know how old; she was never examined by me; she was sold to a man by the name of Hickman; I think the sch'r Wm. Clark was 70 or 80 tons; she might not have been more than 47 tons.

Redirect.

I know she carried from 90 to 100 tons of coal.

DAVID BLIZZARD.

Sworn to and subscribed before me this 20th day of May, A. D. 1859.

GEO. W. MORTON, *U. S. Com'r.*

Adj'd until 10 a. m. to-morrow, May 21, 1859.

MAY 21.

Proctor for lib'lt present.
Adj'd until notice given.

SEPT. 24, 1859.

Asher C. Havens:

I am a commission merchant in the city of New York and deal in produce, corn, &c., and was so dealing in the year 1853. I had a cargo of corn consigned to me by Burton; it was shipped by the

William Clark; corn was worth in January, 1853, at Indian
82 river, that is, yellow corn, by the measure, from 55 to 60 cents; it sells there by measure altogether, and here it sells by weight; (upon reference to my sales book I find corn was worth in this market, by weight, from January 10th, 1853, to Jan'y 25th, 69 to 71 cents.)

(Part in brackets objected to.)

After the 25th of January corn went up. (From 25 Jan'y to 5 Feb'y I find from 73 to 75 cents.)

(Obj. to.)

Cross-examined.

I did not insure the cargo that was lost. I was not at Indian river that winter at all. I can only tell what corn was worth at any time during that winter by reference to my books.

Redirect.

I have referred to my books this morning.

ASHER C. HAVENS.

Read to and subscribed by the witness on his examination before me. Sept. 24, 1859.

GEO. W. MORTON,
U. S. Com'r.

1860, *Feb'y* 11*th*.—The proctor for libellants appears, and no further testimony offered. Adj'd to 14th. Proctors to submit briefs and argue case.

Endorsed: Page 97. 10, 449, 452, 456. U. S. dist. court. Peter R. Burton *et al.* *vs.* The Commander-in-Chief, her tackle, &c. Testimony on reference.

W. J. HASKETT,
Proc. for Lib'ts.
C. DONOHUE,
Proc. for Cl'm'ts.

$26 82.

Filed May 14, 1860.

83 U. S. district court.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c., and John S. Woglom, master.
} 97. 10, 449, 452, 456.

Feb'y 16, 1860.—The proctor for the libellants having consented to open the reference, the case is set down for Feb'y 21, at 11 a. m., for the claimants to introduce their testimony.

Feb'y 21.—The proctors being present, by consent the reference is adjourned until Saturday, the 25th, at 10 a. m.

Saturday 25.—At the request of the proctor for the claimant, the reference is adjourned until Saturday, the 3d March, at 10 a. m.

March 3d.—The proctors for lib'l'ts and claimants being present, adjourned until 10½ a. m. Saturday, 10th March.

10*th.*—The proctors being present—

John S. Woglom, sworn. Says he has followed the water 16 or 17 years. I saw the vessel the Commander-in-Chief ran into on the night of the collision. She was abreast of Old inlet, as near as I can tell, and about 2 miles from the shore. It was at night.

Q. Would there have been any difficulty in taking her in after the collision?

(Obj. to.)

84 A. I do not think there would have been any difficulty in getting her in; the wind was off the land, and the sea smooth. I am familiar with the coast. Little Egg harbor was the nearest harbor she could have got into. That was about 2 miles off. It is considered a safe harbor. There were no means of repairing vessels in the harbor. There are ways at the main; they build vessels there. The main means the bay. When I last saw the vessel she had not sunk.

Cross-ex.

After striking the sch'r, we went back as soon as we could get the sch'r round. We then anchored, and sent our men to the sch'r; did not find any persons aboard. We then went back to our vessel; the sch'r was abandoned. The night was cold. The vessel was above water when we left her; partly listed. I think we could have taken her in tow, and carried her into either of these ports. Our vessel was then in ballast.

JOHN S. WOGLOM.

Sidney M. Brown sworn. I have been a ship-carpenter 15 years; know the value of vessels. The "William Clark" was 47 tons, custom-house measurement.

Q. What was the fair market value of vessels of that character—47 tons register burthen, eight years old?

85 A. The fair value of that vessel would be $1,100. I have owned vessels and parts of vessels. I never saw the vessel.

SIDNEY M. BROWN.

William Joline sworn. I have been in the coasting business until 5 years ago. I was mate in a vessel of 49 tons that was capsized off Squam. She filled. We got her in. She capsized about the month of April or May. I know of another vessel capsized—about 7 miles below Barnegat. She filled. I found her there the next day. She capsized in a snow squall. She was between 80 and 100 tons. She was got into Little Egg harbor. That was in April. The wind was blowing fresh.

Cross.

Neither of these vessels had grain aboard; neither of them were filled with grain. The one on which I was on board had sailing ballast; the other I do not about, so far as ballast is concerned.

WILLIAM JOLINE.

Abraham Sprague sworn. I have been a coaster since I have been a boy. I have had a sch'r upset about half way between Barnegat and Sandy Hook. The vessel had no grain on board. We got her into Sandy Hook. I never saw the Wm. Clark, to my knowledge.

ABR'M SPRAGUE.

Mr. Haskett, proctor for the libellants, objects to all the testimony on the reference as given by the claimant.

The reference is adjourned until Saturday the 17th March, 1860, at 11 a. m.

March 17, 1860.—The proctors for the libellants and claimants appear. The claimant proceeds with the reference on the part of the claimants, and calls William J. Brown.

William J. Brown: Been carpenter since 1824; am familiar with Delaware built vessels; have some judgment about the value of vessels.

Q. What would be the fair market value of such a vessel, (47 tons register, 8 years old?)

(Obj.)

A. I would not like to give $600 for such a vessel.

Q. Would or not that be a fair value for such a vessel?

A. Circumstances alter cases. I would not like to give $600 for such a vessel without seeing her.

Q. repeated. Would or not that be a fair value for such a vessel? (Withdrawn.)

Don't recollect ever having seen her, (the sch'r Wm. Clark.)

87 WILLIAM J. BROWN.

Subscribed and sworn to March 17, 1860, on examination before me

GEO. W. MORTON, *U. S. Com'r.*

Adj'd to 31st of March, 1860, at ½-past 10 a. m.

March 31, 1860.—Mr. Haskett appears; the proctor for the claimant not appearing, Mr. Haskett consents to adjourn to Saturday, the 7th April, at 9½ a. m.

Saturday, April 7.—On application of Mr. Donohue, Mr. Haskett consenting, adjourned to Saturday the 14th, at ½-past 10 a. m.

Saturday, April 14.—On like application and consent adjourned until Tuesday 17, at 10½ a. m.

Tuesday, April 17, 1860.—Mr. Haskett appears; Messrs. Beebe, and Donohue not being present, on motion of Mr. Haskett, the reference is closed.

Feb'y 21.—The proctors being present, by consent the reference is adjourned until Saturday, the 25th, at 10 a. m.

Saturday 25.—At the request of the proctor for the claimant, the reference is adjourned until Saturday, the 3d March, at 10 a. m.

March 3d.—The proctors for lib'l'ts and claimants being present, adjourned until 10½ a. m. Saturday, 10th March.

10*th.*—The proctors being present—

John S. Woglom, sworn. Says he has followed the water 16 or 17 years. I saw the vessel the Commander-in-Chief ran into on the night of the collision. She was abreast of Old inlet, as near as I can tell, and about 2 miles from the shore. It was at night.

Q. Would there have been any difficulty in taking her in after the collision?

(Obj. to.)

84 A. I do not think there would have been any difficulty in getting her in; the wind was off the land, and the sea smooth. I am familiar with the coast. Little Egg harbor was the nearest harbor she could have got into. That was about 2 miles off. It is considered a safe harbor. There were no means of repairing vessels in the harbor. There are ways at the main; they build vessels there. The main means the bay. When I last saw the vessel she had not sunk.

Cross-ex.

After striking the sch'r, we went back as soon as we could get the sch'r round. We then anchored, and sent our men to the sch'r; did not find any persons aboard. We then went back to our vessel; the sch'r was abandoned. The night was cold. The vessel was above water when we left her; partly listed. I think we could have taken her in tow, and carried her into either of these ports. Our vessel was then in ballast.

JOHN S. WOGLOM.

Sidney M. Brown sworn. I have been a ship-carpenter 15 years; know the value of vessels. The "William Clark" was 47 tons, custom-house measurement.

Q. What was the fair market value of vessels of that character—47 tons register burthen, eight years old?

85 A. The fair value of that vessel would be $1,100. I have owned vessels and parts of vessels. I never saw the vessel.

SIDNEY M. BROWN.

William Joline sworn. I have been in the coasting business until 5 years ago. I was mate in a vessel of 49 tons that was capsized off Squam. She filled. We got her in. She capsized about the month of April or May. I know of another vessel capsized—about 7 miles below Barnegat. She filled. I found her there the next day. She capsized in a snow squall. She was between 80 and 100 tons. She was got into Little Egg harbor. That was in April. The wind was blowing fresh.

Cross.

Neither of these vessels had grain aboard; neither of them were filled with grain. The one on which I was on board had sailing ballast; the other I do not about, so far as ballast is concerned.

WILLIAM JOLINE.

Abraham Sprague sworn. I have been a coaster since I have been a boy. I have had a sch'r upset about half way between Barnegat and Sandy Hook. The vessel had no grain on board. We got her into Sandy Hook. I never saw the Wm. Clark, to my knowledge.

ABR'M SPRAGUE.

Mr. Haskett, proctor for the libellants, objects to all the testimony on the reference as given by the claimant.

The reference is adjourned until Saturday the 17th March, 1860, at 11 a. m.

March 17, 1860.—The proctors for the libellants and claimants appear. The claimant proceeds with the reference on the part of the claimants, and calls William J. Brown.

William J. Brown: Been carpenter since 1824; am familiar with Delaware built vessels; have some judgment about the value of vessels.

Q. What would be the fair market value of such a vessel, (47 tons register, 8 years old?)

(Obj.)

A. I would not like to give $600 for such a vessel.

Q. Would or not that be a fair value for such a vessel?

A. Circumstances alter cases. I would not like to give $600 for such a vessel without seeing her.

Q. repeated. Would or not that be a fair value for such a vessel?

(Withdrawn.)

Don't recollect ever having seen her, (the sch'r Wm. Clark.)

87 WILLIAM J. BROWN.

Subscribed and sworn to March 17, 1860, on examination before me

GEO. W. MORTON, *U. S. Com'r.*

Adj'd to 31st of March, 1860, at ½-past 10 a. m.

March 31, 1860.—Mr. Haskett appears; the proctor for the claimant not appearing, Mr. Haskett consents to adjourn to Saturday, the 7th April, at 9½ a. m.

Saturday, April 7.—On application of Mr. Donohue, Mr. Haskett consenting, adjourned to Saturday the 14th, at ½-past 10 a. m.

Saturday, April 14.—On like application and consent adjourned until Tuesday 17, at 10½ a. m.

Tuesday, April 17, 1860.—Mr. Haskett appears; Messrs. Beebe, and Donohue not being present, on motion of Mr. Haskett, the reference is closed.

18. By consent opened and adjourned to 21, at 11 a. m.

21. The testimony being in, adj'd to 28th for the purpose of summing up.

28. The proctors appearing, adj'd to 30, at 11 a. m.

88 30. The proctors being present the testimony is closed, the proctors to hand in their briefs on or before Thursday next.

GEO. W. MORTON, *U. S. Com'r.*

Saturday, May 5, 1860.—Mr. Donohue argues for the clm'ts; Mr. W. Q. Morton, for libl'ts.

Endorsed: 112, 10, 456. U. S. Dist. Court. Peter R. Burton *vs.* The Schooner Commander-in-Chief, &c.

HASKETT, *for Lib'ts.*
BEEBE, DEAN & DONOHUE, *for Cl'm'ts.*

Testimony on opening cause on reference. Fees, $70 04.
Feb'y 16, 1860.

Filed 5th May, 1860.

89 At a stated term of the district court of the United States of America for the southern district of New York, held at the city hall in the city of New York, on Tuesday, the 22d day of May, in the year of our Lord one thousand eight hundred and sixty.

Present: The honorable Sam'l R. Betts, district judge.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &C.
} Vol. 10, pg. 456.

Geo. W. Morton, U. S. Comm'r, brings into court the report made by him in the above-entitled cause. On motion of Wm. J. Haskett, proctor for the libellants, ordered, that said report be confirmed, unless exceptions be filed thereto within four days from this date.

Endorsed: Vol. 10, No. 456. U. S. dist. court, southern dist. of New York. Peter R. Burton *et al. vs.* the Schooner Commander-in-Chief, &c.

W. J. HASKETT, *Proc. for L'b'ts.*

Order conf'g comm'rs report *nisi*, (4 days.)
Filed 22d day of May, 1860.

90 United States district court.

THE SCHOONER COMMANDER-IN-CHIEF, &C.,
ads.
PETER R. BURTON *et al.*
} Exceptions to the report of the commissioner in the above cause.

First. That the commissioner allowed improper and immaterial evidence to be put in by libellant.

Second. That the commissioner has no evidence to justify his report

Third. That the commissioner has reported more than the evidence warranted.

Fourth. That the commissioner has entirely failed to report on the principle of the decree.

Fifth. That the commissioner admitted evidence of witnesses as to value of the vessel, on the part of the libellant, who were not competent as to that fact, and whose evidence should have been rejected.

Sixth. That the commissioner reported the value of the cargo as part of the damage, when the libellant is not entitled to recover therefor:

1. Because he has no legal right thereto if lost by the collision.
2. Because it was not the necessary result of the collision.

91 Seventh. That the evidence shows the vessel to be of far less value than the report.

Eighth. That the loss of the vessel was not the necessary or actual result of the injury to the vessel.

Ninth. Because the loss reported for is shown to have been incurred by the fault of the libellant or his agents.

BEEBE, DEAN & DONOHUE,
For Resp'd't.

Endorsed: 10, 456. U. S. dist. court, Peter R. Burton *et al. vs.* The Schooner Commander-in-chief. Exceptions.

BEEBE, DEAN & DONOHUE,
For Resp'd't.

Filed June 13, 1860.

92 District court of the United States for the southern district of New York.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &C.
} Commissioner's report.

In pursuance of a decretal order made in the above-entitled cause, on the 11th day of May, in the year of our Lord one thousand eight hundred and fifty-eight, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellant for the actual damages to vessel and cargo sustained by the collision, and to report thereon to this court with all convenient speed—

I, George W. Morton, the commissioner to whom the matter was referred, do report that I have been attended by the proctor for the libellants and claimant, and their witnesses, and have taken and examined the testimony offered in support of the libellants' claim for actual damages to vessel and cargo sustained by the collision, and do find that there is due to the libellants, for actual damages to the vessel sustained by the collision, two thousand dollars, ($2,000 00,) and for actual damage to cargo sustained by the collision, fourteen hundred dollars, ($1,440 00,) with interest on both amounts from the 29th March, 1853, the date of filing the libel in this cause, to the date of this report, the sum of twelve hundred and sixty-five $\frac{35}{100}$ dollars, ($1,265 35,) in all amounting to the sum of forty-seven hundred and five $\frac{35}{100}$ dollars, ($4,705 35.)

Dated the 15th day of May, A. D. 1860.

All which is respectfully submitted.

GEO. W. MORTON,
U. S. Commissioner.

W. J. HASKETT, *Proctor for Libellant.*

On filing an order made by the U. S. district court of August 14, 1860, by which the clerk of this court is directed to inspect the above report, and if any error should be found in the computation of interest that the same should be corrected. I hereby state that I find that an error has been made in the computation of interest of one year in time, making a difference to be added of $206 40, together with the interest to this day. amounting to $51 60.

GEO. F. BETTS,
Clerk.

New York, August 14, 1860.

Vol. 10, No. 456. United States district court for the southern district of New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, her tackle, &c. Commissioner's report.

W. J. HASKETT,
Proctor for Libel't.

Filed the 22 day of May, 1860.

93 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Friday, the 22 day of June, in the year of our Lord one thousand eight hundred and sixty. Present: The honorable Samuel R. Betts, dist. judge.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &C.
} Vol. 10, pg. 449.

This cause coming on to be heard on exceptions by the claimant to the report of the commissioner, Mr. Donohue argues in support of the exceptions; Mr. W. Q. Morton argues in support of the report, *cur. adv. vult.*

94 Vol. 10, 449, 462. United States district court for the southern district of New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, her tackle, &c.

W. J. HASKETT, *for L'b'ts.*
C. DONOHUE, *for Cl'm'ts.*

Cause heard on exceptions.

Filed the 22 day of June, 1860.

95 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Thursday, the 12th day of July, in the year of our Lord one thousand eight hundred and sixty—

Present: The honorable Sam'l R. Betts, district judge.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c. } 10, 449, 462.

This case having been heard on exceptions to the commissioner's report, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged and decreed by the court that the exceptions be overruled and the report confirmed, as to the actual damages reported therein, amounting to thirty-four hundred and forty dollars, and that the report be corrected by adding to the actual damages reported interest at the rate of six per cent. for the period of time allowed in said report, amounting to twelve hundred and sixty-five $\frac{35}{100}$ dollars; and that the libellants recover in this action against the claimants the sum of four thousand seven hundred and five dollars and thirty-five cents, together with their costs, to be taxed.

96 And, on like motion, it is further ordered that in pursuance of the act of Congress passed March 3, 1847, a summary judgment be, and the same is hereby, entered against Abraham Latourette, the principal, and John T. Mesereau, the surety, on their bond given on the discharge of the property arrested, for the sum of eight thousand and ninety dollars, the amount of their said bond, executed on discharging the said schooner from custody.

And, on like motion, it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the libellants have execution to enforce satisfaction of this decree.

(Sign'd) SAM'L R. BETTS.

W. J. HASKETT, *Proc'r for Libl'ts.*

Endorsed: Vol. 10, No. 449. U. S. district, southern district of New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, &c.

W. J. HASKETT, *Proc. for Lib't.*

Final decree conf'g com'rs report, and summary judg't against stipr's.

Filed the 12th day of July, 1860.

97 U. S. district court.

SCHOONER COMMANDER-IN-CHIEF, &c.,
ads.
PETER R. BURTON *et al.*

SIR: Please to take notice that the claimants appeal from the decree herein, and every part thereof.

Dated July 16, 1860.

Yours, &c.,
BEEBE, DEAN & DONOHUE, *for Cl'm't.*

To GEO. F. BETTS, Esq., *Clerk.*

Endorsed: 10, 462, U. S. district court. The Schooner Commander-in-Chief *ads.* Peter R. Burton *et al.* No. of appeal.

BEEBE, DEAN & DONOHUE, *Pro. Cl'm'ts.*

Filed July 17, 1860.

99 IN ADMIRALTY.

U. S. district court, southern district of New York.

PETER R. BURTON *et al.*, libl'ts,
agt.
THE SCH'R COMMANDER-IN-CHIEF, &c.

Please take notice that I will move this honorable court, at the opening thereof, on Tuesday next, May 22d, 1860, for the confirmation of the report made and filed by the commissioner in the above entitled cause.

Dated New York, May 18, 1860.

Yours, &c.,
W. JAY HASKETT,
Proctor for Lib'l'ts.

To CHAS. DONOHUE, Esq., *Proctor for Claimants.*

On reading and filing notice of motion, on hearing W. J. Haskett, esq., in support of the motion to correct the decree herein, and C. Donohue, in opposition thereto, ordered that the clerk of this court examine the report and decree herein, and, if found incorrect, that he make an entry in the report of the fact in which the same
100 is deficient, and that a decree be entered for the true amount, the exceptions already made and argued being considered as made and argued to the amount as found to be due under the order.

Aug. 14, '60.

(Sign'd) W. D. SHIPMAN.

Endorsed: 10, 462. U. S. district court. In admiralty. Peter R. Burton *et al.*, libl'ts, *agt.* The Schooner Commander-in-Chief, &c.

I hereby admit due service of a notice, of which the within is a copy.

Dated New York, May 18, 1860.

BEEBE, DEAN & DONOHUE, *Proct's for Cl'm'ts.*

Filed May 18, 1860.

Judge's order entered and filed Aug't 14, 1860.

101 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Tuesday, the 14 day of Aug., in the year of our Lord one thousand eight hundred and sixty—

Present: The honorable William D. Shipman, district judge.

PETER R. BURTON *et al.*
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c. } 10, 449.

This case having been heard on exceptions to the commissioner's report taken by the claimants, and argued by the advocates for the respective partes, and due deliberation being had in the premises; and by a decree made and entered on the 12th day of July, 1860, it having been ordered, adjudged, and decreed by the court that the exceptions be overruled and the report confirmed as to the actual damages reported therein, amounting to thirty-four hundred and forty dollars, and that the report be corrected by adding to the actual damages reported interest at the rate of six per cent. for the period of time allowed in said report, amounting to twelve hundred and sixty-five $\frac{35}{100}$ dollars.

And an order of court having been made this day by which the
clerk of this court is directed to inspect the commissioner's
102 report in this cause, and if any error should be found therein,
as to the computation of interest, that the same be corrected; and the clerk having found and certified that an error in the aforesaid computation of interest has been made of one year in time, making a difference to be added of $\$206\frac{40}{100}$, together with interest from the 15th day of May, 1860, (the date of said report,) to the date of this decree, which amounts to the sum of $\$51\frac{60}{100}$ dollars, it is now ordered, adjudged, and decreed by the court that the libellants recover, in this action against the claimants, the sum of forty-nine hundred and sixty-three dollars and thirty-five cents, together with their costs, to be taxed.

And, on like motion, it is further ordered that, in pursuance of the act of Congress passed March 3, 1847, a summary judgment be, and the same is hereby, entered against Abraham Latourette, the principal, and John T. Mesereau, the surety, on their bond given on the discharge of the party arrested, for the sum of eight thousand and ninety dollars, the amount of their said bond executed on discharging the said schooner from custody.

And, on like motion, it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the libellants have execution to enforce satisfaction of this decree.

(Signed) WM. D. SHIPMAN.

W. J. HASKETT, *Proc. for the Libellants.*

Vol. 10, No. 449, 462. U. S. dist. court, south'n dist. New York. Peter R. Burton *et al. vs.* The Schooner Commander-in-Chief, her tackle, &c.

W. J. HASKETT, *Proc.*

103 U. S. district court.

THE SCH'R COMMANDER-IN-CHIEF
ads.
PETER R. BURTON *et al.*

Please take notice that the claimant and respondent appeals to the circuit court of the United States for the southern district of New York from the final decree entered in this cause.

Yours, &c.,

BEEBE, DEAN & DONOHUE,
Proctors for Respondents.

To GEO. F. BETTS, Esq., *Clerk.*
W. J. HASKETT, Esq., *Proc. for Lib'l'ts.*

Endorsed: 10, 449, 462. U. S. district court. The Sch'r Commander-in-Chief *ads.* Peter R. Burton. Notice of appeal.

BEEBE, DEAN & DONOHUE,
Proctors.

Filed 22 Aug., 1860.

104 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Thursday the 30 day of August, in the year of our Lord one thousand eight hundred and sixty.

Present: The honorable Sam'l R. Betts, dist. judge.

PETER R. BURTON, &c.,
vs.
SCH'R COMM'R-IN-CHIEF.
Vol. 10, pg. 462.

Let the defendant and claimant have ten days further time to perfect their appeal herein.

Dated August 30, 1860.

(Signed) SAM'L R. BETTS.

105 Endorsed: Vol. 10, 462. U. S. district court southern district of New York. Peter R. Burton *et al. vs.* The Sch'r Commander-in-Chief, &c.

C. DONOHUE, *Proc. for Cl'm't.*

Order to extend time to appeal, (10 days.)

Filed the 30 day of August, 1860.

106 Of the United States of America for the southern district of New York, in the second circuit.

Peter R. Burton *et al.*, libellants and appellees,
vs.
The Schooner Commander-in-Chief, her tackle, &c., cl'm'ts appellants.
} Bond for costs.

Know all men by these present that we, Abraham Latourette and John Latourette, of the county of Richmond and State of New York, are held and firmly bound unto the above-named libellants and appellees in the sum of ten thousand dollars, to be paid to the said libellants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the tenth day of September, in the year of our Lord one thousand eight hundred and sixty.

Whereas, the above named claimants have prosecuted an appeal to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit, by the judge of the district court of the United States for the southern district of New York:

Now therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ABRAHAM LATOURRETT. [L. S.]
JOHN LATOURRETT. [L. S.]

Sealed and delivered, and taken and acknowledged, this 10 day of Sept., 1860, before me,

JOSEPH BRIDGHAM, *U. S. Com'r.*

107 United States of America,
Southern District of New York, ss:

John Latourrett, being duly sworn, deposes and says that he resides in the county of Richmond and State of New York, and that he is worth the sum of ten thousand dollars, over and above all his just debts and liabilities.

JOHN LATOURRETT.

Sworn to this tenth day of September, A. D. 1860, before me,
JOSEPH BRIDGHAM, *U. S. Com'r.*

Vol. 10, page 462. U. S. circuit court. Peter R. Burton *et al.*, lib'l'ts and appellees, *vs.* Schooner Commander-in-Chief and Abr'm Latourette *et al.* cl'm'ts and appellants. Bonds for costs on appeal.

C. DONOHUE,
Appellants' Proctor.

Filed this 10 day of ——, 1860.

108 U. S. circuit court for the southern district of New York.

PETER R. BURTON and WILLIAM H. LINGO,
libellants and appellees.
vs.
THE SCHOONER COMMANDER-IN-CHIEF,
resp'd'ts and appellants.

To the honorable Circuit Court of the United States for the southern district of New York, in the second circuit:

The petition of appeal of Abraham Latourette and Daniel Butler respectfully shows:

That heretofore and on the 29th day of March, 1853, Peter R. Burton and William H. Lingo filed their libel in the district court of the United States for the southern district of New York, against the schooner Commander-in-Chief, her tackle, &c., and John Woglam, master, claiming that the same should be condemned to pay libellants four thousand and forty-five dollars and costs.

That the petitioners, on the 31st of March, 1853, filed their claim for said vessel, her tackle, &c., and filed a bond, pursuant to act of Congress, and duly filed their answer, taking issue on the libel.

109 That such proceedings were thereupon had that by the decree of the said court, on the 14th day of August, 1860, it was ordered, adjudged, and decreed that the libellants recover against the schooner Commander-in-Chief, &c., the sum of four thousand nine hundred and sixty-three $\frac{35}{100}$ dollars for the damages and costs in the pleadings mentioned.

That the appellants allege there is manifest error in the decree of the court, also in the report of the commissioner and the proceedings before him, as also in the final decree in the cause, and that the same and every part thereof is erroneous and should be reversed.

Wherefore the appellants appeal from the said decree, and every part thereof, to the next circuit court to be held in said district, and on said appeal intend to have the cause heard anew on new pleadings and proofs, as also upon the proofs in the district court; and they pray that the said decree and every part thereof be reversed, annulled, and altogether held for nothing, and the respondents restored to their rights in the premises.

BEEBE, DEAN & DONOHUE,
Proctors for Appellants.

110 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

John T. McGowan, of said district, being duly sworn, says that on the 10 day of Sept. inst., at the city of New York, deponent served a copy of the within petition of appeal on Wm. Jay Haskett, esq., proctor for the libellants in the within action, by delivering to and leaving with the said Haskett, personally, the same.

J. T. McGOWAN.

Sworn before me this 10th day of Sept., 1860.

JOSEPH BRIDGHAM, *U. S. Com'r.*

Endorsed: 10, 462. U. S. circuit court. Peter R. Burton *et al.*, *vs.* The Sch'r Commander-in-Chief, her tackle, &c. Petition of appeal.

BEEBE, DEAN & DONOHUE,
Proctors for Cl'm'ts.

I admit the receipt of a petition of appeal, of which within is a copy.

W. JAY HASKETT.

Filed 10 Sept., 1860.

111 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Wednesday, the 29 day of May, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

PETER R. BURTON, lib'l'nt and appellee,
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c., cl'm'ts and app'l'nts.

The appeal in this case coming on to be heard—

Testimony on both sides is read from the apostles in the case.

Mr. Morton is heard on the part of appellee.
Mr. Donohue do. do. app'l'nt.
Mr. Morton is heard in reply.

Cur. ad vult.

112 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on the 14 day of November, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

PETER R. BURTON and WILLIAM H. LINGO, owners of the schooner William Clarke, libellant,
ag'st
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c., and John Woglam, master thereof, claimants.

This cause coming on to be heard on appeal from the district court of the United States for the southern district of New York, and having been argued by advocates for respective parties, and due deliberation having been thereon had:

It is now ordered, adjudged, and decreed that the decree of the said district court made in this cause on the twelfth day of July, 1860, and amended on the 14 day of August, 1860, be, and the same is, in all things affirmed. And on motion of W. Jay Haskett and W. Q. Morton, proctor and advocates for the libellants, it is hereby decreed that the libellants recover herein of the claimants and stipulator of the schooner Commander-in-Chief, her tackle, apparel, 113 and furniture, the sum of four thousand nine hundred and sixty-three dollars and thirty-five cents, ($4,963 35,) together with the sum of three hundred and thirty-five dollars and eighty-one cents, ($335 81,) the costs of the district court, and the costs of this court, including interest on the decree, amounting to five hundred and thirty-one dollars and fifty-eight cents, ($531 58,) amounting, in all, to the sum of five thousand eight hundred and thirty dollars and seventy-four cents, ($5,830 74.)

And on like motion it is ordered that unless an appeal be taken from this decree, within the time prescribed by law, then the said stipulators cause their stipulations to be fulfilled, and that the libellants have execution for the amount hereby decreed.

Endorsed: U. S. circuit court. Peter R. Burton *et als.*, lib'l'nts, *ag'st* The Schooner Commander-in-Chief, her tackle, &c. Cl'm'ts' decree.

W. J. HASKETT, *Lib'l'nts' Proctor.*

Filed Nov'r 14, 1861.

114 *To the honorable the Supreme Court of the United States of America:*

The petition of appeal of Abraham La Tourette and Daniel Butler respectfully showeth: That heretofore and on or about the 29th day of March, 1853, Peter R. Benton and William H. Lingo filed their libel in the district court of the United States for the southern district of New York, claiming damages for a collision against the schooner Commander-in-Chief, her tackle, &c. That thereafter an answer was duly filed, taking issue on such libel, and the cause was duly heard in said district court by a decree thereof on the 12th day of July, 1860. The said court adjudged that the libellants recover against the claimants the sum of four thousand seven hundred and five dollars and thirty-five cents, besides costs, that the claimants duly prosecuted his appeal from said decree to the circuit court of the United States for the southern district of New York, in the second circuit; and the same was duly heard in said court; and that thereafter the said circuit court did order, adjudge, and decree that said decree of the district should be in all things confirmed with costs. That your petitioner respectfully insists that the said decree is erroneous, and he appeals from the said decree and each and every part thereof, and prays that the Supreme Court of the United States may proceed to hear the said cause anew on new allegations and proofs, and to reverse and annul said decree of the said circuit court, and to restore to the appellants all rights which they have lost by reason of said decree.

BEEBE, DEAN & DONOHUE,
For Appellant.

115 U. S. Supreme Court. Abraham La Tourette and Daniel Butler, appellants, *vs.* Peter R. Burton and William R. Lingo, respondents. Petition of appeal.

BEEBE, DEAN & DONOHUE,
Proctors.

Filed November 16th, 1861.

116 Circuit of the United States of America for the southern district of New York, in the second circuit.

PETER R. BURTON and WILLIAM H. LINGO,
vs.
THE SCHOONER COMMANDER-IN-CHIEF, HER TACKLE, &c.
} Bond for costs.

Know all men by these presents that we, Abraham La Tourette and John La Tourette, of Richmond county, State of New York, are held and firmly bound unto the above-named Peter R. Burton and William H. Lingo in the sum of nine thousand six hundred and sixty dollars, to be paid to the said Burton and Lingo, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 16 day of November in the year of our Lord one thousand eight hundred and sixty-one.

Whereas, the above-named Abraham La Tourette and Daniel Butler have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such, that if the above-named Abraham La Tourette and Daniel Butler shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ABRAHAM LA TOURETTE. [L. S.]
JOHN LA TOURETTE. [L. S.]

Sealed and delivered, and taken and acknowledged this 16 day of Nov., 1861, before me.

R. E. STILWELL,
U. S. Com'r.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John La Tourette, being duly sworn, doth depose and say that he is a resident and freeholder in the State of New York, and that he is worth the sum of nine thousand six hundred and sixty dollars over and above all his just debts and liabilities.

JOHN LA TOURETTE.

Sworn to this 16 day of Nov., 1861, before me.

R. E. STILWELL,
U. S. Com'r.

U. S. Circuit Court.—Peter R. Burton, William H. Lingo, *vs.* The Schooner Commander-in-Chief. Bond for costs on appeal.

BEEBE, DEAN & DONOHUE,
Proctors.

Filed this 16 day of Nov'r, 1861.
Approved Nov. 16, 1861.

S. NELSON.

118 *Citation.*

By the honorable Samuel Nelson, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Peter R. Benton and William H. Lingo:

Whereas Abraham La Tourette and Daniel Butler, claimants of the schooner Commander-in-Chief, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said Peter R. Burton and William H. Lingo, against the said claimants, and have filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York in the southern district of New York, in the second circuit, the 16th day of November in the year of our Lord 1861, and of the independence of the United States the eighty-sixth.

S. NELSON.

BEEBE, DEAN & DONOHUE,
Proctors.

Filed March 24, 1862.

119 U. S. Supreme Court. Abraham La Tourette and Daniel Butler, appellants, *vs.* Peter R. Burton and William H. Lingo, respondents. Citation. Beebe, Dean & Donohue, proctors. Filed Nov. 16th, 1861. Service of the within citation is hereby admitted, November 16th, 1861.

W. JAY HASKETT,
Proctor for L'bl'ts.

1247

Supreme Court

OF THE UNITED STATES.

ABRAHAM LATOURETTE, et al.,
Appellants.

vs.

PETER R. BURTON, et al.,
Appellees.

APPELLEES' STATEMENT AND BRIEF.

On the night of the 26th of January, 1853, at about 6 o'clock P. M., the schooner William Clarke, bound on a voyage from Indian River to the port of New York, deeply laden with a cargo of corn in bulk, anchored within two or three miles north of Little Egg Harbor Light, and about half a mile from the Jersey shore, and in three and a half fathoms of water. The night was clear and intensely cold, and the moon, nearly full, was brightly shining.

She anchored because the wind, from the northwest, was blowing heavily and dead ahead, and too sharply to lay her course around Barnegat. At that time there were seven or eight vessels within sight to the south of her, and the master took all the necessary precautions, by furling her sails, trimming her lamp, and putting it up twelve feet high in her main rigging, and placing a competent watch on her deck.

At about 10 o'clock that night, still clear moonlight and very cold, the schooner Commander-in-Chief came from the northward with a free seven to eight knot wind, and struck with her stem the schooner William Clarke, in her starboard waist, forward of ths main chains, cut through her sides, plankshear, and waterways, broke off her mainmast; and although every effort was made to stop the leak, she sunk in fifteen minutes from the time of the blow, and the crew escaped from their sinking vessel in their small boat, to the schooner George Moon, in an almost frozen condition.

Upon this state of facts, it was decreed that the appellees herein should recover the value of the vessel and her cargo.

The decrees of the courts below should be confirmed for these reasons:

APPELLEE'S POINTS.

I.

That the schooner William Clarke was anchored by force of necessity from the intense coldness of the night, and her inability to double Barnegat with that wind, dead ahead; and that she was anchored in a proper place, with seven or eight other vessels anchored to the south of her.

II.

That she had a light in her rigging, seen from other vessels a mile and a half off, and also a competent watch on her deck.

III.

That the clearness of the night, shown by all the witnesses for the appellees, and corroborated in the most material point by all the witnesses of the appellants, places the fault, beyond all doubt, on the appellants.

IV.

That the appellants did not have a sufficient watch and lookout in a proper place, at the time of the collision.

That the collision herein was clearly shown, *in both courts below*, to have been without fault of the libellants, and that they were entitled to recover their full damages for the loss of the vessel and cargo.

1. For the *value* of the *vessel;* because the *abandonment* was proven to have been a stern necessity.

   If the appellants assume that she could have been saved by any efforts of the appellees, it fastened upon them the duty, having caused her loss, to have become her salvors, for their own benefit.

2. For the damages to her cargo; because the collision was the immediate cause of the loss thereof, and the owners of the vessel, as common carriers, are liable over to the owners.

   This point is settled in Propeller Commerce, 1st Black, p. 582.

The value of the vessel is fixed by witnesses sufficiently expert, and *specially* acquainted with the schooner William Clarke's value to her owners.

The diminution of her value attempted by appellants, fails because their witnesses did not know her. It does not amount to any legal force as against the testimony of those who had specific knowledge of her value.

The principle ruling this point is laid down in the case of the ship Marcellus, 1st Black, 414; Waterwitch case, 1 Black, 494; and affirmed in the case of the ship Potomac, 2 Black, 581.

That the clear and well-settled rulings upon these points by this honorable court, and the absence of any new evidence or principle on which this appeal is founded, raise the presumption that the appeal in this case has been *merely for delay*, and the appellees are entitled to full damages under the 23d Rule of this court.

WM. JAY HASKETT,

Attorney and Counselor of this Court.

Of Counsel for Appellees.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 129.

THE COMMANDER-IN-CHIEF, FOURETTE & BUTLER, CLAIMANTS,

vs.

PETER R. BURTON AND ANOTHER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Libel by Burton & Lingo against the Commander-in-Chief for running down the William Clarke. Material averments in the libel.

First. That Burton & Lingo were owners of the William Clarke, and that she sailed from Indian river, Delaware, laden with corn, and was anchored off Little Egg Harbor, New Jersey, on the night of the 26th of January, 1853, the weather being clear and moonlight.

Second. That she was tight, stanch, and strong, and well and sufficiently manned and provided for her employment, and had a sufficient crew.

Third. That she was securely anchored about *half* a mile from the beach in three and a half fathoms of water, with "a light burning and hanging in the rigging, and a man as a lookout."

Fourth. That the Commander-in-Chief, "heading south, came down under four full sails with a free wind, and ran into and against the schooner William Clarke, cutting her right through abreast of the main chains," and from the effect thereof the schooner sunk in "fifteen minutes," with her cargo, and is a total loss, which were of the value of $4,045.

Fifth. That the collision was caused by "the negligence, mismanagement, and unseamanlike conduct" of those having charge of the Commander-in-Chief, and not of those in charge of the William Clarke.

Sixth. That every effort was made that could have been made to avoid the collision on the part of the William Clarke.

Seventh. That the Commander-in-Chief had no lookout forward, or in a proper place, at and immediately preceding the collision.

THE ANSWER.

The claimants deny all these averments except the second, relating to the ownership and character of the William Clarke, how she was provided and manned, as to which they say they are ignorant.

This puts in issue all the material averments.

THE FACTS AS SHOWN IN THE RECORD.

1. Although at the time of the collision there was moonlight, there was a vapor on the water that prevented seeing objects low upon it.

Woglom's Ev., (R., p. 31.)—"The night was moonlight. I did not see her, because it was a very cold night, and there was a vapor on it"—the water. "The moon bore from us from three to four points on our lee bow. We had to get right under the moon's rays to see the vessel we came afoul of."

Endicott's Ev., (R., p. 32.)—"There was a vapor upon the water. Anything above the vapor you could see a good ways, but a vessel's hull you could see but a short distance; you could see a light half a mile." (P. 33.) "In standing back to the other schooner (William Clarke) I could not see her until we got under the line of the moon."

1253

Dayton's Ev., (R., p. 30.—"It was very [difficult] about seeing up a piece from the water; it was kind like a fog; you could see a light a good piece—a quarter of a mile."

"We anchored say half a mile off, may be not so far. I could not see her (the William Clarke's) masts when we anchored. We could not see her until we got the range of the moon, and then we could see her masts."

Endicott's Ev., (R., p. 33.)—"I don't think we could see her sails and [hull] over a hundred yards."

This refers to the fishing smack.

From this evidence it is clear that there was a vapor on the water, and that a vessel without sails or light could be seen but a few rods by an approaching vessel.

Tingle's Ev., (R., p. 13.)—He was the libellant's lookout, and says he saw a vessel coming right for us, and adds, "She was a quarter of a mile off when I first saw her."

This shows that libellant's own lookout could not, in fact, see a vessel under full sail over a quarter of a mile off.

2. The injured vessel had no sufficient light, in a proper place.

The libellant's witnesses say there was a light in the rigging, without stating where it was, except the man on watch, and one other.

Boisseau's Ev., (R., p. 30.)—"The way the wind was then, the best place [for a light] would be between the masts, as ours was. The jib would not be so good a place. I would not think alongside the mast to be a good place; the reason I think the best place for the light between the masts, is, that as the wind was, the vessel headed on shore; if the wind had been along shore, the rigging would have been better than between the masts; I do not know that it would be as good a place, but not better. If it was on one side in the rigging, and the vessel came the other, it might get in range of the mast."

This evidence comes from libellant's witnesses and will account for the Wm. Clarke's light not having been seen.

Woglom's Ev., (R., p. 31.)—"She did not have any light, that is, the schooner we hit."

It is clear that if the William Clarke had a light up at the time of the collision, it was in the wrong place so that it could not be seen, and this led to the accident.

Tingle, libellant's watch, (R., p. 15.)—"The light on our vessel was on the larboard side, main rigging."

Burton's Ev., (R., p. 19.)—"It was put in the larboard main rigging, and don't know to which strand."

This evidence establishes two things; first, if there was a light up, it was in the wrong place, the larboard side; second, that it had none which could be seen in approaching her starboard side, on which the collision took place.

The ground taken at the time by the captain of the Commander-in-Chief was that there was no light which he could see. (R., p. 17.)

Boisseau's Ev., (R., p. 28,) Libellants' witness.—"Capt. Burton said he (Capt. Woglom) had done him a good deal of damage, and sunk his vessel and run him down. The captain of the schooner asked him what he was doing laying there without a light up. Capt. Burton said he had a light up and a man on deck. The captain of the schooner said he had not, for he had looked under his lee three or four minutes before and had seen no lights except the lights of the vessels that were anchored together. I don't recollect that Capt. Burton made any reply to this.

3. The Commander-in-Chief had a sufficient look out.

Woglom's Ev., (R., p. 31.)—"At the time of the collision I was at the wheel. There was a look out, a man whose name I have forgotten. He was one of the crew."

This evidence is not contradicted, and disproves one averment contained in the libel.

4. When the William Clarke was discovered, all proper exertions were made to avoid her.

Woglom's Ev., (R., p. 31.)—"The schooner with which the collision occurred, was about one hundred yards off when I first saw her. I hove my wheel up to keep off—to clear."

This was a proper movement on the part of the Commander-in-Chief, and it was not his fault, if it did not prove successful. The truth of this evidence is not questioned by any evidence in the record.

5. The injured vessel did not sink and was held down by her anchor.

The witnesses agree that there were about five fathoms of water where the collision occurred.

They also agree that she moved up and down with the waves, and that one of the davits and the taffrail could be seen.

Prince's Ev., (R., p. 12,) libellants' witness—"Next morning could see her taffrail; she was lower than she was the night before; a very cold night; she was held down by the anchor."

Tingle's Ev., (R., p. —,) libellants' witness—"Our vessel did not go lower in the water than that you could see her davits when she lifted. She was not on the bottom. We last saw her next morning, Thursday, at after daylight, about sunrise. * * * The reason she lifted as she did, and did not lift her forward part, was because, I suppose, she was anchored."

Woglom's Ev., (R., p. 32.)—He states that after the collision he returned with his vessel to near the injured vessel, and adds, "I could see her hull at this time. She did not sink while we were there."

Burton's Ev., (R., p. 18.)—He was captain of the injured vessel. When on the schooner Moon, 200 yards off his vessel, he says: "Could see her from the schooner Moon—the spar remaining and a little of her aft the starboard quarter. When the sea would lift her we could see her aft, then the sea would cover her again."

6. If proper exertions had been made by those on board of the William Clarke, she would not have filled with, or sunk down in the water.

The libellants' witnesses agree that they did nothing to prevent her from filling, and that they left her before the water reached the cabin floor, and that she did not actually sink. But one witness testifies that a hole was cut into the injured vessel, and his statements are too inconsistent to be relied upon.

Burton, libellants' master, (R., p. 16, 17, 19,) says: "And cut us through on our starboard side just forward of our main rigging, that she sunk in fifteen minutes. We left her in about five minutes after the blow. I went, before I left, to see the injury; from one to two feet through her bends and water ways; I can't say how far the cut went below. I put my hand there and the water had nothing to do but to flow in." (P. 19.) "I put my hand outside of the bulwarks; I put my hand through the place in the bulwarks. I stood inside. Our vessel was loaded down to within a foot of the deck."

"No water in the cabin while we continued on board. We did not do anything to stop the leak; we did nothing to do anything to stop the leak. I did not think if we had thrown a bed overboard it would have been drawn into the hole. I did not measure the break at all. The plank-shear was cut;

I don't know if it cut through. I don't recollect whether there was any stancheon carried away on that side."

"The schooner William Clarke was smashed up, from one to two feet."

(P. 20,) "We had beds, that is, mattresses, three or four; had also blankets and quilts too; I stood down; I put my hand out through the hole."

From this evidence alone, it is evident that proper exertions by the master and crew would have prevented the schooner from filling. No other witness examined the hole, and but one other (Culver, p. 25,) professes to have seen one. From the other evidence it is doubtful whether one of any size was actually made.

Dayton, (R., p. 30,) went from the Commander-in-Chief to the injured vessel. He says: "I went in our boat to the other vessel; we found her bows some down in the water, listed over a little to port; no one on board. The side that I saw was whole enough. I did not examine the other. I examined the starboard side."

Woglom's Ev., (R., p. 32.) After he returned with his schooner to relieve the William Clarke, he says of her:

"I saw one of her masts after we came back. The mast was above water. I could see her hull at this time. She did not sink while we were there."

Endicott's Ev., (R., p. 33.)—He went to the W. Clarke, and says: "I looked at the starboard side; I did not see any injury to it; her starboard was standing; I saw nothing injured more than her mast was gone."

These facts showing the condition of the W. Clarke, and the fact that she did not sink and go to the bottom, are conclusive of three things:

First, that she was not badly injured; second, that it was clearly within the power of her crew to have prevented her sinking to the extent she did; and third, that there was no hole actually cut through the W. Clarke, except through her bulwarks, which might have been stopped by simple means known to all good sailors.

7. The William Clarke might have been towed ashore and saved.

She did not sink, and her bow was held down by her anchor. There is no evidence that she ever went down, or what actually became of her. But there is evidence that she might have been taken into port, where she could have received repairs as far as needed.

Woglom's Ev., (R., p. 38.)—He was asked if there would have been any difficulty in taking her in, and answers:

"I do not think there would have been any difficulty in getting her in; the wind was off the land, and the sea smooth; I am familiar with the coast; Little Egg Harbor was the nearest harbor she could have got into; that was about two miles off; it is considered a safe harbor; there were no means of repairing vessels in that harbor; there are ways at the main; they build vessels there; the main means the bay; when I last saw the vessel she had not sunk; the vessel was above water when we left her, partly listed; I think we could have taken her in tow and carried her into either of these ports; our vessel was then in ballast."

Joline & Sprague (R., pp. 38–9) testified to vessels having been got in under similar circumstances.

No rebutting evidence was offered on this point by libellants, which is substantially an admission that she might have been towed in and saved if those in charge of her had performed their duty.

8. The vessel was not worth over $1,100.

The libellant proved by Blizard (R., p. 35) that she was worth $3,000, and offered no other evidence of her value.

S. M. Brown, a ship carpenter, (R., p. 38,) testified that the William Clarke measured forty-seven tons, and that the fair value of such a vessel was $1,100.

W. J. Brown, also a ship carpenter, (R., p. 39,) was asked the fair market value of a vessel of forty-seven tons, and eight years old, and answers he would not like to give $600 without seeing her.

The average of this evidence is that she was not worth over $1,100, and we are bound to treat this as her true value.

THE DECREES.

On the evidence, Judge Ingersoll decreed that the libellants recover "the *actual* damages to the vessel and cargo sustained by the collision."

The commissioner, under this order, reported the damage to the vessel $2,000, and $1,440 to the cargo, with interest from the date of filing the libel.

To this report there were nine exceptions filed by the claimant.

Judge Betts, in the district court, confirmed this report, and after correcting the cast of interest, decreed to libellants $4,705 35, and costs to be taxed.

It was afterwards amended by Judge Chipman, and entered for $4,963 35.

On appeal to the circuit court this decree was confirmed, and an appeal was taken to this court.

POINTS.

First. *The libellants having anchored their vessel, the deck was almost level with the water, in a great thoroughfare of navigation, in a cold night, when there was a mist or vapor upon the water, without displaying a sufficient light in a suitable place, so as to be seen on the side injured, cannot recover.*

The libellants proved that their vessel anchored in a great thoroughfare for vessels, and that the night was cold—that she was so loaded as to leave the deck only about a foot above water, and that her light was hung on her larboard side in the main rigging, and that the claimant's vessel approached on the starboard side. It was proved by the claimant's witnesses, that there was a mist or vapor on the water, that prevented their seeing any considerable distance, except considerably above the water.

This presents the question, whether, in such a night, with such a vessel, and the wind off shore, it was a proper display of a light, to place it in the main rigging on the larboard side of the vessel, and especially as regards vessels on the starboard side. Libellants' own witness, Boisseau, swears that it was not, and assigns the reason, as the wind was, it might get in range with the mast so as not to be seen by approaching vessels. In this case it is proved that it was not seen by the colliding vessel, which renders it conclusive, that if the light was in the main rigging on the larboard side, it was obscured and rendered useless by getting in range with the mast. This will excuse the approaching vessel for not seeing it, and the vapor upon the water will account for a vessel only a foot above it, and no sails up, not being seen until within a hundred yards. Under such circumstances, she was badly in fault and cannot recover for an injury occasioned by her own acts and position.

Second. *The Commander-in-Chief performed her whole duty in endeavoring to avoid a collision.*

It was not her fault that there was no light visible to her on the injured vessel, which could be seen by a vessel approaching her starboard side. The William Clarke hung her light in the main rigging on the starboard side, which, although it might be seen from a vessel approaching on that side, would be naturally shut out from the view of one approaching from the other side. When the colliding vessel came so near as to be able to see the hull of the vessel—she had no sails up—she immediately hove her wheel up to keep clear of her, the truth of which has not been questioned in the evidence, nor denied that it was a proper step. This was all she could do, and if so, she is not answerable for the collision.

Third. *It having been in the power of the injured vessel to stop the leak, she was bound to do so, and having failed in performing that duty, she cannot recover for more than the cost of repairs and for the delay occasioned by making them, if she can recover at all.*

From the evidence it is clear that the injury to the William Clarke was small, and that the leak occasioned by it might have been stopped by proper efforts. Instead of attempting this, the master and crew abandoned the vessel in a panic, without making a single effort to prevent the schooner from filling and sinking. It is certain that the injured vessel filled and sunk, and the cargo became injured, because those managing her neglected to perform their duty in stopping the leak, as they might have done. Hence, she cannot recover, if she does at all, except for the cost of repairs and for the loss occasioned by the delay in making them.

Fourth. *The master and crew of the William Clarke, having neglected to take her into port when they might have done so, the claimants are not liable if held responsible for her whole value, but only for the necessary cost of repairs and for the delay.*

That the real injury was small, is clearly proved, and the evidence shows that after it occurred, she might have been towed into a harbor and saved. She was afloat the next morning at sunrise, when the master and crew left her to her fate without making any effort to save her. Her stern was up in sight all the time, and her bow was kept down solely by the anchor. Had that been released she would have been above water her whole length. But this necessary duty was entirely omitted by those on board.

She was afloat in thirty feet water, from which it is certain she could have been towed two miles to where repairs could be made. Instead of making an effort to save her, those on board left her at the mercy of the winds and waves, by which she probably perished. They were bound to save her, if she could be saved. Having neglected this clear duty, the libellants can only recover what it would have cost in time and money to repair her, and not her full value at the time of the collision.

FIFTH. *The owners of the injured vessel were bound to ascertain whether she had any and what value; and if she had any, to protect and save her; and if they did not, the amount of that value must be deducted from her value at the time of the collision, and a recovery can only be had for the residue.*

In collision cases, the injured vessel has duties to perform, both in endeavoring to avoid the danger, but also in protecting and preserving what may remain after they occur, whether it is a large or small portion, according to its value at the time of the collision. Her managers cannot leave her and her cargo, as a derelict when anything of value can be saved beyond the cost of saving. In this respect the law of the sea is the same as on land, where, in cases of torts, the value of what remains is considered in estimating the injury. The owner of an injured wagon cannot abandon and recover of the wrong-doer its whole value, but a sum sufficient, when added to the value of what remains of it, to recompense him for his loss.

The first thing required at the hands of the injured party is, that he shall ascertain by competent persons, whether anything can be saved, and if so, how much. If anything can be saved, he must save it, and if he fails to do so, he must deduct that sum when seeking to recover for the injury sustained. If, under such circumstances he abandons it, it is on his own account and at his own loss. Can he, by notice to the other party, relinquish to him, the injured vessel and cargo, and let him make what he can out of it, and then recover for the whole value at the time of collision?

If this can be done, which has not been yet decided, it should be done at the earliest possible period, so as to allow the party upon whom the claim is to be made to save as much as possible from the abandoned property. To abandon and claim for a total loss, without notifying the party upon whom the claim is to be made, or its extent, and not confer power upon him to control and appropriate the thing abandoned, would be grossly unjust. It would be making him responsible as for a total loss when it might be only partial, without his knowing the intention or wishes of the other party, or being able to protect himself as far as possible by saving what could be saved.

But the proposition contained in this point seems preferable on many, if not all accounts, and is supported by the following authorities, which are applicable to the present case:

In *Williamson* vs. *Barrett*, 13 How., 101, this Court held, in a case originating on the Ohio river, that—

"The proper measure of damages is a sum sufficient to raise the sunken boat, repair her, and compensate the owners for the loss of her use during the time when she was being refitted."

In *The Schooner Catherine* vs. *Dickinson*, 17 How., 170, it was held by this Court—

"In cases of collision, where the injured vessel has been abandoned, the measure of damages is the difference between her value in her crippled condition and her value before the collision; and this is to be ascertained by the testimony of experts who can judge of the probable expense of raising and repairing the vessel. But when the vessel has been actually raised and repaired, the actual cost incurred is the true measure of indemnity."

In the present case, instead of ascertaining the "actual damages," the commissioner allowed the libellants the whole value of the cargo, and $2,000 as the whole value of the vessel, when both might have been saved by proper exertions in stopping the leak, and the vessel could have been taken in and repaired. No regard was paid by the libellants or the commissioner to the decision in the case of the Catharine, which fixed as a rule of damages the difference between the value of the vessel before and after the collision. This error was sanctioned below, and should now be rectified by reversing the decree, and sending the cause back to be disposed of upon the true principle of law as laid down in the above case.

SIXTH. *The libellants are not entitled to recover for the value of the cargo.*

The libellants have neither averred or proved that the cargo belonged to them, nor have they shown in what character they held. They have not averred or shown they were carriers. But the inference is fair that it was taken as freight for third persons. They do not even show that the claim for the loss of the cargo was assigned to them, or that they became the insurers of it. Nor is it shown that under the circumstances claimed by libellants in this case, they would be liable over to the shipper. It does not appear whether the libellants or shippers insured, or not; or if insured, whether they have abandoned to the underwriters, so that the claim, if valid, belongs to the latter.

If the Commander-in-Chief is liable for the loss of this cargo, the shippers, or their assignees, if they insured and abandoned to the underwriters, have a claim upon her, and paying to the libellants would not discharge that claim. The latter may be insolvent, and holders of the claim might be unwilling to have the amount pass into their hands. Without some act authorizing the libellants to represent them, they would not be bound by anything they might do in the premises. They might choose to proceed on their own account, either against the schooner, the master, or owners, for the amount of injury they have sustained. Neither could plead payment to an unauthorized party; and the legal effect is the same whether paid under a decree or voluntarily. Such a plea would be demurrable, without the addition that they had, as a matter of fact, been constituted their own agents to receive. It follows that the libellants cannot recover for the value of the cargo.

It is no answer to say that the libellants are liable to the shippers for it. This may, or may not be so, and depends more upon what is not, than what is to be found in the record. The libellants have no right to impose upon the claimants the chances of double payment for the same thing. They had it in their power to have placed this matter upon firm and proper footing by filing the libel in behalf of themselves and for the benefit of the shippers, or in some other way, made them parties, so that a recovery would have enured to their advantage and concluded them, and would have left the proceeds, when collected, in the registry, for them. It is clear, if the libellants could not do this, and thus bind the shippers, they cannot bind them when not named or referred to in the libel; and. if they could not thus bind them they cannot recover for the value of the shippers' property.

The case of Fitzhugh and others against the Propeller

1165

Commerce, (1 Black, 574,) does not determine this question. That was a case of common carriers, and this is not. Whether the owners of the cargo were protected by the form of the proceedings, or concurred therein, is not stated. Ordinary shipments, like the present, are upon special agreement, and the freighter is not a common carrier. But even in case of common carriers, the owner of property retains his ownership and right to control and to sue for injury to it. In the case of the *New Jersey S. N. Co., vs. Merchants Bank*, 6 Howard, 344, pp. 380, 381, it was held by this Court:

"The general property remained in the libellants, (Bank,) the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them. This would be clearly so, if Harnden is to be regarded as a private agent; and even, if in the light of a common carrier of this description of goods, the result would not be changed so far as relates to the right to the property. The carrier has a lien on the goods for his freight, if not paid in advance, but subject to this claim, he can set up no right of property, or possession against the general owners. (Story on Bailments, 939.) The carrier, says Buller, J. is considered in law, the agent or servant of the owner, and the possession of the agent is the possession of the owner." (4 T. R., 490.)

"The cases are numerous in which the general owner has sustained an action of test against the wrong-doer for injuries to the property while in the hands of the bailer."

Whether the libellants in this case are treated as freighters, or common carriers, the result is the same, they cannot recover for the cargo. But they are not common carriers.

R. H. GILLET,
Of Counsel for Claimants.

Dated, *January* 23, 1864.

M'GILL & WITHEROW, PRINTERS, WASHINGTON.

Sixth. *The libellants are not entitled to recover for the value of the cargo.*

The libellants have neither averred or proved that the cargo belonged to them, nor have they shown in what character they held. They have not averred or shown they were carriers. But the inference is fair that it was taken as freight for third persons. They do not even show that the claim for the loss of the cargo was assigned to them, or that they became the insurers of it. Nor is it shown that under the circumstances claimed by libellants in this case, they would be liable over to the shipper. It does not appear whether the libellants or shippers insured, or not; or if insured, whether they have abandoned to the underwriters, so that the claim, if valid, belongs to the latter.

If the Commander-in-Chief is liable for the loss of this cargo, the shippers, or their assignees, if they insured and abandoned to the underwriters, have a claim upon her, and paying to the libellants would not discharge that claim. The latter may be insolvent, and holders of the claim might be unwilling to have the amount pass into their hands. Without some act authorizing the libellants to represent them, they would not be bound by anything they might do in the premises. They might choose to proceed on their own account, either against the schooner, the master, or owners, for the amount of injury they have sustained. Neither could plead payment to an unauthorized party; and the legal effect is the same whether paid under a decree or voluntarily. Such a plea would be demurrable, without the addition that they had, as a matter of fact, been constituted their own agents to receive. It follows that the libellants cannot recover for the value of the cargo.

It is no answer to say that the libellants are liable to the shippers for it. This may, or may not be so, and depends more upon what is not, than what is to be found in the record. The libellants have no right to impose upon the claimants the chances of double payment for the same thing. They had it in their power to have placed this matter upon firm and proper footing by filing the libel in behalf of themselves and for the benefit of the shippers, or in some other way, made them parties, so that a recovery would have enured to their advantage and concluded them, and would have left the proceeds, when collected, in the registry, for them. It is clear, if the libellants could not do this, and thus bind the shippers, they cannot bind them when not named or referred to in the libel; and. if they could not thus bind them they cannot recover for the value of the shippers' property.

The case of Fitzhugh and others against the Propeller

1163

Commerce, (1 Black, 574,) does not determine this question. That was a case of common carriers, and this is not. Whether the owners of the cargo were protected by the form of the proceedings, or concurred therein, is not stated. Ordinary shipments, like the present, are upon special agreement, and the freighter is not a common carrier. But even in case of common carriers, the owner of property retains his ownership and right to control and to sue for injury to it. In the case of the *New Jersey S. N. Co., vs. Merchants Bank*, 6 Howard, 344, pp. 380, 381, it was held by this Court:

"The general property remained in the libellants, (Bank,) the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them. This would be clearly so, if Harnden is to be regarded as a private agent; and even, if in the light of a common carrier of this description of goods, the result would not be changed so far as relates to the right to the property. The carrier has a lien on the goods for his freight, if not paid in advance, but subject to this claim, he can set up no right of property, or possession against the general owners. (Story on Bailments, 939.) The carrier, says Buller, J. is considered in law, the agent or servant of the owner, and the possession of the agent is the possession of the owner." (4 T. R., 490.)

"The cases are numerous in which the general owner has sustained an action of test against the wrong-doer for injuries to the property while in the hands of the bailer."

Whether the libellants in this case are treated as freighters, or common carriers, the result is the same, they cannot recover for the cargo. But they are not common carriers.

R. H. GILLET,
Of Counsel for Claimants.

Dated, *January* 23, 1864.

M'GILL & WITHEROW, PRINTERS, WASHINGTON.

1265